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Scientific Jury Selection and the Equal Protection Rights of Venire Persons

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Jury trials have always been a source of anxiety for litigators. Despite years of preparation, the outcome of a case can turn on the whimsical biases of a group of people who may or may not understand the legal arguments involved. In recent years, attorneys have taken steps to reduce this uncertainty by hiring social scientists who study jury decision making. One of the most popular services which these consultants offer is assistance in the jury selection process.[1] The use of sociological and psychological methods in identifying and excluding unfavorable jurors from service, known as Scientific Jury Selection ("SJS"), has been growing for decades.[2] As a private litigation aid, SJS has remained

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1. *See generally* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 79-95 (1986); Valerie P. Hans, *Jury Decision Making, in* HANDBOOK OF LAW & PSYCHOLOGY, at 61, 62-64 (D. K. Kagehiro & W. S. Laufer, eds. 1992); James D. Herbsleb et al., *When Psychologists Aid in the Voir Dire: Legal and Ethical Considerations, in* SOCIAL PSYCHOLOGY AND DISCRETIONARY LAW 197 (Lawrence E. Abt & Irving R. Stuart eds., 1979); John Berman & Bruce D. Sales, *A Critical Evaluation of the Systematic Approach to Jury Selection*, 4 CRIM. JUST. & BEHAV. 219 (1977); Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L. J. 575, 590-95 (1985); Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178 (Dec.-Jan. 1990); Michael J. Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical*, 17 JURIMETRICS J. 3 (1976); John L. Wanamaker, Note, *Computers and Scientific Jury Selection: A Calculated Risk*, 55 U. DET. J. URB. L. 345, 350-51 (1978).

2. Stephen J. Adler, *Litigation Science: Consultants Dope Out the Mysteries of Jurors for Clients Being Sued*, WALL ST. J., Oct. 24, 1989, at 1; Diane Burch Beckham, *The Art of Voir Dire: Is it Really a Science?: Community Surveys, Focus Groups Used More in Jury Selection*, NEW JERSEY L. J., July 5, 1990, at 5; Charles Bremner, *Oddballs of the Jury*, THE TIMES, Sept. 2, 1991, *available in* LEXIS, Nexis Library, paper file; Robert D. Minick, *Using Jury Consultants in Voir Dire*, MASS. LAW. WKLY., Dec. 9, 1991, at S2; Emily Couric, *Jury Sleuths: In Search of the Perfect Panel*, NAT'L L. J., July 21, 1986, at 1 (stating that jury consulting has experienced "Geometric" growth); Gail D. Cox, *Consultants to the Stars, They Deploy an Army of 100+ Ph.D.s*, NAT'L L. J., May 29, 1989, at 26; Judith Dancoff, *Hidden Persuaders of the Courtroom*, BARRISTER, Winter 1985,

unregulated and unsupervised.[3] The Supreme Court's recent cases on equal protection and peremptory challenges, including *Batson v. Kentucky*,[4] however, suggest that SJS may face increased scrutiny by the courts. These cases hold that a litigant may not use the race of the venire persons as a justification for peremptory challenges. Since SJS has consistently relied on observable characteristics such as race,[5] litigants risk crossing the

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at 8; James Gray, *Can You Really Predict What a Juror Will Think?*, MED. ECON., Sept. 23, 1985, at 136; Richard Greene, *Jury Tampering*, FORBES, Nov. 5, 1984, at 214; Morton Hunt, *Putting Juries on the Couch*, NEW YORK TIMES MAG., Nov. 28, 1982, at 70; *Jury Science; Psychodrama*, THE ECONOMIST, July 8, 1989, at 86; Monique Parson, *Jury Consulting Standing Trial With Attorneys*, BUS. INS., Aug. 21, 1989, at 3; Tamar Lewin, *Jury Research: Growing Field*, 8 SOC. ACTION & L., May-June 1980, at 50. John H. Kennedy, *Pretrial Studying of Jurors: Becomes a Key to the Case*, THE BOSTON GLOBE, Feb. 19, 1990, at 1.

3. *See infra* note 13 and accompanying text (discussing the lack of supervision of SJS).

4. 476 U.S. 79 (1986). *See infra* Section III.

5. DONALD E. VINSON & PHILIP K. ANTHONY, SOCIAL SCIENCE RESEARCH METHODS FOR LITIGATION, SS. 1-6, 4-1, 4-2, 4-3 (1985); Berman & Sales, *supra* note 1; Covington, *supra* note 1, at 576; Brian L. Cutler, *Introduction to the Status of Scientific Jury Selection in Psychology and Law*, 3 FORENSIC REP. 227, 229 (1990); Solomon M. Fulero & Steven D. Penrod, *Attorney Jury Selection Folklore: What Do They Think and How Can Psychologists Help?*, 3 FORENSIC REP. 233, 234 (1990); Hans, *supra* note 1, at 62-63; Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 718; Irwin A. Horowitz, *Juror Selection: A Comparison of Two Methods in Several Criminal Trials*, 10 J. APPLIED SOC. PSYCHOL. 86, 88 (1980); Neal Miller, *Facts, Expert Facts, and Statistics: Descriptive and Experimental Research Methods in Litigation*, 40 RUTGERS L. REV. 467, 490 (1987) ("The most cited social science technique used for jury selection is the sample survey"); Saks, *supra* note 1, at 6-7; Richard L. Moskitis, Note, *The Constitutional Need for Discovery of Pre Voir Dire Juror Studies*, 49 SO. CAL. L. REV. 597, 605-07 (1976); Wanamaker, *supra* note 1, at 350-51; Adler, *supra* note 2 at 1; Beckham, *supra* note 2, at 5; Diane Burch Beckham, *Voir Dire Voodoo; Consultants Make New Inroads*, TEX. LAW., Apr. 30, 1990, at 1 (noting that demographic predictors often do not predict as well as other variables); Couric, *supra* note 2; Dancoff, *supra* note 2 at 52-53; Amitai Etzioni, *Creating an Imbalance*, TRIAL, Nov.-Dec. 1974, at 28; Gray, *supra* note 2, at 136; Greene, *supra* note 2, at 214; Hunt, *supra* note 2, at 70; Saul M. Kassin, *Mock Jury Trials*, 7 TRAIL DIPL. J. 26 (1984); Lewin, *supra* note 2, at 50; Minick, *supra* note 2, at 52; Howard A. Moore, Jr., *Redressing the Balance*, TRIAL, Nov.-Dec. 1974, at 29; Parsons, *supra* note 2, at 3; *Pre-Trial Research: "The Insurer's Insurance"*, 32 BEST'S REV. 32 (1983); Michael J. Saks, *Social Scientists Can't Rig Juries*, PSYCHOL. TODAY, Jan. 1976, at 60; Roberta W. Shell, *Scientific Jury Selection: Does it Work?*, BARRISTER, Sum. 1980, at 46; Jay Schulman et al., *Recipe for a Jury*, PSYCHOL. TODAY, May 1973, at 37; Curtis J. Sitomer, *Jury Tapping Sniffs of Tampering*, CHRISTIAN SCI. MONITOR, Sept. 7, 1989, at 13. *But see* Bremner, *supra*, note 2 (stating that the Supreme Court has declared the use of race and gender unconstitutional); Cox, *supra* note 2, at 26 (no mention of race); Gail Diane Cox, *Delving Into Juror's Minds; Questionaires, Once a High Stakes Tactic, Enter Into the Mainstream*, NAT'L L. J., Jan. 21, 1991, at 1 (stating that the use of juror questionnaires avoids the need to rely on demographic characteristics); Kevin Dunne, *Drawing a Line Between Art and Mythology*, THE RECORDER, Feb. 21, 1991, at 6 (stating that many modern consultants do not believe that demographic characteristics predict juror bias); John H. Kennedy, *Pretrial Standing of Jurors;*

constitutional limits by hiring an SJS consultant. Even if the SJS consultant uses permissible characteristics, the process itself may raise the scrutiny of a court.[6] This paper discusses the possibility that the new scrutiny applied to peremptory challenges in general endangers the continued use of SJS.

Part I discusses SJS and how its methods rely on classifications such as race. Part II reviews that history of constitutional challenges to jury selection procedures, and Part III relates this history to SJS. Part IV describes several arguments that might exempt SJS from this new scrutiny. Part V details the possibility that classifications other than race might be attacked by future courts, thereby further undermining the basis for SJS. Part VI concludes that while SJS may remain a useful tool, litigators would be wise to weigh its benefits against its possible liabilities before hiring an SJS consultant.

I. SJS IN GENERAL

SJS is not selection at all. Rather, it takes advantage of a litigant's power to exclude a specific number of potential jurors from service on the jury panel.[7] Litigants exercise these exclusions, called peremptory challenges, based on a limited amount of information about the potential jurors, such as their gender, race, occupation, age and marital status. While attorneys rely on intuition or personal experiences in deciding which venire persons to strike from service, an SJS consultant uses empirical research to ascertain which observable characteristics mark venire

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Becomes Key to the Cases, BOSTON GLOBE, Feb. 19, 1990, at 1 (no reference to the use of demographic predictors, although it contains only a cursory description of the services used). Even though some references fail to describe the use of demographic predictors, most describe one of the jury service firms in particular, which states in its brochure that demographic predictors are poor predictors of bias, but still uses such predictors in combination with other predictors. *See* BROCHURE OF LITIGATION SCIENCES INC. (1988) (on file with author).

6. *See infra* notes 137-148 and accompanying text (discussing SJS's susceptibility to constitutional challenge).

7. For a summary of SJS methods, see *infra* Section II; HANS & VIDMAR, *supra* note 1, at 79-95; Hans, *supra* note 1, at 62-63; Covington, *supra* note 1, at 590-95; Hastie, *supra* note 5, at 717-721 (1990); Wanamaker, *supra* note 1, at 346-52.

persons with undesirable attitudes or biases. With over three hundred individuals or firms currently offering these services,[8] social science consultation for jury trials has grown into a two hundred million dollar a year industry.[9] By some accounts, in nearly every jury trial involving significant stakes, one or more parties has hired an SJS consultant.[10]

Despite its impact on large scale litigation, SJS remains almost completely unregulated.[11] Since an SJS consultant advises an attorney on how to use peremptory challenges, and these require almost no explanation to judges, the source of the advice also need not be divulged. Furthermore, although attorneys are constrained by ethics codes, SJS consultants are usually not members of the bar, and, hence, are not bound by them. Indeed, no professional code or licensing procedure for SJS consulting currently exists. Unlike almost all other pre-trial activities, neither formal nor informal procedures govern the work of an SJS consultant. The inherent supervisory power of a court grants judges the authority to regulate the activities of a consultant,[12] but courts have rarely utilized this

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8. Hans, *supra* note 1, at 63.

9. Gail Appleson, *Corporations Look to Surrogate Juries in Big Cases*, THE REUTERS BUSINESS REPORT, June 5, 1989, *available in* LEXIS, Nexis Library, Business file.

10. Kennedy, *supra* note 5, at 1. Scientific jury selection is unquestionably widespread. In a recent informal survey I questioned fourteen large law firms from New York City, all reported that someone in their firm had recently used a psychological consultant for trial preparation. Several firms exist which are dedicated entirely to performing such services, and many individuals in the law and psychology field report that they have been hired as consultants. *See, e.g,* Kassin, *supra* note 5, at 26. One of the psychological litigation firms employs over 100 people, and claims to have worked on over 1000 cases and lists literally all of the country's biggest and best law firms as past clients. Cox, *supra* note 2, at 22.

11. *See* Herbsleb et al., *supra* note 1, at 200; Moskitis, *supra* note 5, at 605-07; Wanamaker, *supra* note 1, at 350-51.

12. Several courts have used their power to control the discovery of information about jurors and venire persons. *See, e.g.*, Sinclair v. United States, 279 U.S. 749, 764-66 (1929) (condemning the hiring of a private detective to follow the jurors); Wilkerson v. Johnson, 699 F.2d 325, 330 (6th Cir. 1983) (trial judge may refuse post-trial interviews with jurors); Commonwealth v. Allen, 400 N.E.2d 229, 232-239 (Mass. 1980) (trial judge may prohibit interviews with neighbors of venire persons); United States v. Barnes, 604 F.2d 121, 142-43 (2d Cir.1979) (jurors names may be withheld from the defense). The current trend is to permit investigation of the venire persons so long as the investigation will not involve direct contact with jurors or potential jurors. *See, e.g.*, United States v. Costello, 255 F.2d 876, 882-84 (2d Cir.) (government may investigate Internal Revenue Service files for names of venire persons) *cert. denied*, 357 U.S. 937 (1958), *reh'g denied*, 358 U.S. 858 (1958); Dow v. Carnegie-Illinois Steel Corp., 224 F.2d 414, 430-31 (3d Cir. 1955) (investigation of

authority.[13] Part of SJS's appeal may arise from this immunity from court or opponent scrutiny.

II. THE METHODS USED IN SJS

There are probably as many different methods of SJS as there are SJS consultants, but they all share some basic features. Like conventional jury selection, SJS has, as its primary goal, the identification of jurors who will respond unfavorably to one's case. However, SJS uses empirical data, rather than intuition, to determine which jurors will be hostile. An SJS consultant will generally use a statistical procedure called regression analysis[14] to develop a model of desirable and undesirable jurors. Applying this model to the pool of venire persons tells the SJS consultant whether a venire person is likely to make a friendly or hostile juror. Many critics have argued that it is a useless procedure and confers no advantage,[15] but as stated above, it has found

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jurors is proper so long as the reasonable tendency of the activity is not to intimidate jurors) *cert. denied* 350 U.S. 971 (1956). At least one court has declared that pre-trial interviews with neighbors are "a smart move, and a practice of all good lawyers." Salt Lake City v. Pipenburg, 571 P.2d 1299, 1300 (Utah 1977). Limitations on investigation typically arise out of concern that the investigation will lead to direct contact with the actual venire persons or will otherwise violate privacy rights of the venire persons. *See generally* Joshua Okun, *Investigation of Jurors By Counsel: Its Impact on the Decisional Process*, 56 GEO. L. J. 839 (1968).

13. *See* United States v. Lehder-Rivas, 669 F. Supp. 1563, 1566-69 (M.D. Fla. 1987) (court issued an injunction prohibiting the defendant and his consultants from conducting mock trials or survey research). The *Lehder-Rivas* court at first declared that if the purposes of the survey were to find evidence to support a motion to change venire, then the defendant would have a First Amendment right to conduct a community survey. *Id.* at 1566. After allowing the first survey, however, the court refused to allow a second. *Id.* at 1567. The court argued that surveys designed to assist counsel in jury selection have no First Amendment merit. *Id.* It also held that the Sixth Amendment does not require that courts permit such a survey. *Id.* at 1567-68. The court then determined that since the defendant could use such surveys and mock trials to create publicity and interfere with the proper administration of justice, it could properly issue an injunction against their use pursuant to the supervisory power of the court. *Id.* at 1569. Thus, according to *Lehder-Rivas*, surveys and mock trials have no constitutional value, and judges are free to enjoin them, although they rarely do so. *See also* Kiernan v. Van Schaik, 347 F.2d 775, 780 (3d Cir. 1965) (availability of jury surveillance groups may not correct inadequate voir dire).

14. *See infra* note 30 and accompanying text (discussing regression analysis).

15. *See, e.g.*, HANS & VIDMAR, *supra* note 1, at 79-95; Hans, *supra* note 1, at 63; Saks, *supra* note 1, at 13-21; Adler, *supra* note 2, at 1; Beckham, *supra* note 2, at 5; Gray, *supra* note 2, at 136; Greene, *supra* note 2, at 214; Hunt, *supra* note 2, at 70; Parson, *supra* note 2, at 3; Saks, *supra* note 5, at 60.

widespread acceptance throughout the legal community. Others have attacked it as unethical, unconstitutional and illegal, but, outside of the equal protection challenges described later in this paper, SJS probably does not violate rules for ethical lawyering.[16]

A. The Data Used in SJS Consulting

As discussed, SJS relies on empiricism. Attorneys often have theories of how members of various groups might decide cases, but these theories are only intuitive guesses. SJS starts with these guesses, and proceeds to test their veracity.

Before collecting data, the SJS consultant must determine which psychological characteristics a favorable or unfavorable juror will possess. In some cases, a well defined psychological variable will accurately predict juror verdicts. For example, psychologists believe that the extent to which individuals identify with or support authority figures can predict juror's reactions to criminal trials.[17] This characteristic, known as authoritarianism, is well researched, and it probably successfully predicts juror's responses to cases involving authority figures.[18] In other cases, the consultant may have to define or create a new measurement device. In a large anti-trust case, for example, no obvious variable may correlate with favoring a plaintiff or defendant. An SJS consultant may have to

16. *See, e.g.,* Herbsleb et. al, *supra* note 1, at 197; Moskitis, *supra* note 5, at 605-07; Etzioni, *supra* note 5, at 28.

17. Herman E. Mitchell & Donna B. Byrne, *The Defendant's Dilemma: Effects of Juror's Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PERSONALITY & SOC. PSYCHOL. 123, 125-26 (1973); Horowitz, *supra* note 5, at 88.

18. High authoritarians tend to submit more readily to authority figures, and also tend to express rejection and prejudice towards ethnic and racial groups other than their own. They tend to be more punitive towards lawbreakers and accept few excuses for such behaviors. Various authoritarian scales exist, and typically include such items as: "Do you believe that the most important social virtues are obedience and respect for authority?" and "Do you believe that what our youth need most is strict discipline and rugged determination?" The original work on authoritarianism comes from THEODORE W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1950). *See also,* David G. Myers, SOCIAL PSYCHOLOGY 397-99 (4th ed. 1993) (brief summary of work on the authoritarian personality).

conduct some initial research to create an attitude scale[19] or some other measurement devise which predicts a verdict preference. Such research would normally consist of showing a large number of people an abbreviated version of the case, and correlating their reactions to the new attitude scale.

If the attitude scale which the SJS consultant plans to use to discern favorable jurors is short, an SJS consultant may not need to collect further data. An attorney could simply administer the attitude scale to the venire persons during voir dire. The prospects of actually being able to do this are remote, especially in jurisdictions where voir dire is conducted by the judge.[20] A judge will not allow an attorney to administer the attitude scale since these scales tend to be lengthy, and appear to ask irrelevant questions. Recently, some state courts have begun to allow the litigants to prepare a series of questions which venire persons can answer in pencil and paper form.[21] This innovation would allow an SJS consultant to measure the attitudes directly. Under these circumstances, an SJS consultant need do nothing more than determine which measurable attitudes will best predict verdicts and include the attitude scale in the venire questionnaire.

In most cases, judges restrict voir dire, and the SJS consultant will have to make guesses as to which venire persons hold the desired attitudes. This requires that SJS consultants conduct the community surveys which are the hallmark of SJS. In such a survey, the SJS consultant will administer the relevant attitude

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19. Attitude scales consist generally of a series of questions which relate to a central, core attitude. The aggregate set of responses to these questions reflects the extent to which a respondent endorses the core attitude. *See, e.g.*, Myers, *supra* note 18, at 112-16. For example, an SJS consultant defending a polluter against a toxic tort suit might want to measure the extent to which potential jurors espouse environmental concerns. The consultant could do this by creating an "environmentalism scale," which consist of a series of questions such as "do you believe that global warming is a serious threat to the world's climate?" and "Do you believe that endangered species should be protected even if it hurts the economy and costs jobs?." The consultant will combine the responses to these questions into a single score, which presumably predicts the individual's response to allegations of a toxic tort.

20. This is the case in nearly all federal venues. Gordon Bermant & John Shapard, *The Voir Dire Examination, Juror Challenges, and Adversary Advocacy, in* THE TRIAL PROCESS 69 (Bruce D. Sales ed., 1981); GORDON BERMANT, JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS 11-13 (Fed. Jud. Center 1982).

21. *See, e.g.*, Cox, *supra* note 2, at 1.

measurement over the telephone along with several questions concerning characteristics which are likely to correlate with the attitude scale. These characteristics should correspond to information that the consultant can observe in the venire persons at trial. The community survey will typically include questions concerning race, gender, age, education, occupation, political beliefs, or anything which can both be easily assessed in the venire persons and will correlate with the target attitude. The consultant will use the survey data to determine which characteristics mark jurors who have the target attitude. The attorney who has hired the consultant can use this information to determine which venire persons to strike with peremptory challenges.

The efficacy of such a procedure in identifying unfavorable jurors is weak, at best. With a restricted voir dire, the SJS consultant must make two statistical inferences. First, the consultant's power to identify unfavorable jurors is limited by the correlation between the target attitude and the final verdict. Even a powerful variable like authoritarianism fails to account for a large number of verdict choices.[22] Second, the community survey data will not perfectly determine which venire persons even have the target attitude. In fact, the literature on SJS contains several examples of the failure of the procedure to accurately identify the attitudes of venire persons.[23] Regardless, experts on jury decision making seem to agree that the procedure can confer a marginal advantage to a litigant.[24] One expert has stated that if used consistently in every case, SJS probably would increase a litigator's chances of success by about five percent.[25] Despite its

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22. *See supra* note 18 (discussing authoritarianism).

23. *See, e.g.*, HANS & VIDMAR, *supra* note 1, at 85 (describing an elaborate jury selection procedure in an early case of SJS which misidentified a young female student as an extremely favorable juror for the defense, when in fact, she made the strongest arguments for the prosecution during deliberation); Hans Zeisel & Shari Seidman Diamond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial*, 1 AM. B. FOUND. RES. J. 151, 162-66 (1976) (describing the overwhelming pro-defense position of a juror whom the SJS consultants for the defense thought would be least favorable).

24. HANS & VIDMAR, *supra* note 1, at 85; Saks, *supra* note 1, at 3; Diamond, *supra* note 1, at 178.

25. *See* Hastie, *supra* note 5, at 717-21.

disadvantages, the reasons why attorneys continue to rely on SJS in cases involving multiple millions of dollars is obvious. When substantial assets are on the line, an attorney tries to gain every advantage, no matter how marginal. Even though SJS has its limits when it must rely on community surveys, litigants involved in costly suits prefer to use this data over their intuition.

B. Using the Survey Data

SJS surveys will frequently uncover several characteristics which correlate with the targeted attitude. For example, imagine that the consultant has been hired by a criminal defendant, who is trying to identify jurors who score high on the authoritarianism scale. The survey data might show that, in the relevant venue, older citizens are more authoritarian than younger, and that Latinos score higher than all other racial groups.[26] Further suppose that the consultant analyzes other data, such as gender and marital status, but that these variables do not correlate with authoritarianism. This data has already told the consultant a great deal. It shows that the defense should probably direct its peremptory challenges at older citizens and at Latinos. Furthermore, it suggests that the other characteristics which do not correlate with the target attitude, and should be ignored during voir dire.[27] As the early SJS consultants observed, the correlations between global attitude measures and demographic characteristics vary between communities, and must therefore be measured anew with each different venue.[28]

In this hypothetical scenario, the consultant will want to glean more information out of this survey data. She will want to assess the data for interactions between any of the individual relationships. Although the data already shows two clear relationships, it may be more helpful to analyze the combined effect of the two

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26. Higher in that the groups are more inclined to identify with authority figures than those who score lower on the scale.

27. Although this may be more complicated. *See infra* notes 29-32 and accompanying text (discussion of interaction effects).

28. HANS & VIDMAR, *supra* note 1, at 87. This is part of what makes SJS so expensive. These surveys must be repeated for each attitude in each new venue, and may even change over time. *Id.*

characteristics. Rather than thinking of them as two separate categories, the consultant will assess four different groups: older Latinos, younger Latinos, older non-Latinos, and younger non-Latinos. This analysis may show, for example, that although as a group Latinos are more authoritarian than non-Latinos, in this particular community, the entire effect may be driven by a tendency for older Latinos to be much more authoritarian than younger Latinos. Also, it could be that younger non-Latinos are similar to older non-Latinos, and that overall, the effect is driven by the extreme position of the older Latinos.

Analysis of these interactions might also alter the analysis of some of the characteristics which did not distinguish high and low authoritarians. In the example, assume that the consultant found that neither gender nor education correlates with authoritarianism in the sample. This finding does not mean that the two variables are entirely useless as predictors. If highly educated males are more authoritarian than all of the females, who in turn are more authoritarian than the less educated males, then neither gender nor education alone will be useful predictors. The consultant can, however, use this combination as a basis to advise the defendant to strike as many highly educated males as possible.

In addition to flushing out the characteristics which distinguish high authoritarians, the consultant must assess the size of the effect. Since the number of peremptories is limited,[29] the consultant will want to target those characteristics which correlate with authoritarianism most strongly. The consultant will want to combine the effects of several of these characteristics into a single weighing function.

Returning to the original description of the data, if Latinos are more authoritarian than non-Latinos, older citizens are not more

29. In federal court, parties in a civil case are allowed three peremptory challenges each. 28 U.S.C. § 1870 (1992). In a criminal case, the number varies with the penalty, each side is allowed three if the crime is punishable by less than 1 year in prison, and each gets twenty in a capital case. For crimes in between, the prosecutor gets six and the defense gets ten. FED. R. CRIM. P. 24(b). Each state has its own rules on peremptory challenges. California, for example, allows six for each side in civil cases, twenty each for capital cases, and ten each for lesser offenses. CAL. CIV. PROC. CODE § 231 (West Supp. 1993).

authoritarian than younger, and these effects do not interact, then the consultant must know how to combine and compare these two effects. The SJS consultant will have to give advice as to whether it would be more useful to strike an older venire person who is not Latino or whether to strike a Latino venire person who is not old. In effect, the consultant must use the survey data to derive an equation which will weigh the characteristics of all of the venire persons according to the likelihood that they will support the client's case.

In order to combine the data into a single equation, the SJS consultant will use a mathematical technique known as multiple regression analysis.[30] Multiple regression permits the SJS consultant to score the effect of each variable on a single scale. The final product of the regression analysis will be an equation which tells the consultant how to weigh each of the jurors' characteristics. The equation will give no weight to any of the characteristics which do not distinguish high and low authoritarians. The model will also weigh each of the characteristics that do matter according to the size of the relationship it bears to the target attitude.

The SJS consultant will use the regression equation derived from the survey data to assess the predilections of the potential jurors. The equation will give each venire person a unique score that allows the attorney to compare them against each other. In our hypothetical venire, if the data shows that Latinos are much more authoritarian than non-Latinos, that older people are slightly more authoritarian than younger, that these two effects do not interact, and no other effects matter, the regression equation is simple and straightforward. The equation will score the potential jurors in terms of these two characteristics. Older Latino jurors will score highest followed by younger Latinos, older non-Latinos, and

30. For a full description of the technique, see JACOB COHEN & PATRICIA COHEN, APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES (2d ed. 1983).

younger non-Latinos.[31] Usually, the consultant will have to compile several of these variables in order to provide a relatively determinant piece of advice for the litigant.[32]

C. The Role of Suspect Classifications

The interdependent nature of the characteristics in the regression equation makes assessing the effect of a single classification problematic. In the hypothetical above, suppose that the consultant had found a correlation between authoritarianism and both being a Latino and being older, and therefore advised the litigator to strike older Latinos. Is the attorney's use of a peremptory challenge against an older Latino venire person unconstitutional? One could argue that it is not unconstitutional because the challenge was motivated both by a forbidden classification, Latino versus non-Latino, and by an acceptable classification, age. Since it was not entirely a product of racial distinctions, the consultant could argue that it respects the Fourteenth Amendment rights of the venire persons.[33] This answer must be incorrect, however, since it ignores the important role that the unconstitutional category played in the analysis. If the consultant had not used race, then the litigant may have used the peremptory challenge on a different venire person.

Determining the specific effect of the forbidden classification depends upon the results of the survey data. If the survey data

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31. SJS consultants may also factor in some consideration of the potential dynamics of the jury. Being aware that high status jurors, such as those with high socio-economic status or some expertise in the case, have more influence on the verdict than low status jurors, consultants will pay special attention to the high status jurors. *See, e.g.*, HANS & VIDMAR *supra* note 1, at 85-86. Thus, if the regression equation indicates that a high status juror is likely to support the adversary's position, SJS consultants will be sure to try to strike this venire person.

32. Although, in the example provided, the characteristics are scored as dichotomous, a consultant may use a continuous measure for further refinement. For example, age can be scored as either dichotomous, with some cutoff age dividing "older" from "younger" people, or as continuous, which involves entering the exact age into the equation.

33. Age is not a suspect classification demanding heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976). But classifications involving Latinos are subject to such scrutiny, and are usually unconstitutional. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 495 (1977).

showed that both age and race predict authoritarianism, but do not interact with each other, then the impact of race is straightforward. The regression equation will have a specific term in its model for the weight it gives to race. To generate the set of advice that a consultant would have provided without using race, one need only take the term out of the equation and recalculate the predictions. For example, in the case where race and age contribute independently to the effect, one could easily recreate the advice given without race in the equation. The consultant would have simply suggested striking older venire persons, and not necessarily older Latino venire persons. Since this is obviously a much larger group, the attorney would resort to intuition and hunches to exercise the remaining challenges.

If the regression equation were more complex, however, the results could be more striking. Assume that the consultant discovers that race, age, and education all predicted authoritarianism. Further suppose that race is the most powerful predictor, followed closely by age and that education is the weakest predictor. These circumstances would lead the consultant to the advice described in Table 1.

TABLE 1

Hypothetical Models of SJS With and Without Race for Eight Venire Persons and Three Peremptories by the Defendant

V.P. Characteristics				Model 1[2] (Race Included)		Model 2[3] (Race Not Included)	
V.P.	Education	Age	Race	Priority Score	Strike?[1]	Priority Score	Strike?[1]
1	College	Older	Latino	9	Y	4	?
2	College	Older	Other	4	N	4	?
3	College	Young	Latino	5	N	0	N
4	College	Young	Other	0	N	0	N
5	No College	Older	Latino	11	Y	6	Y
6	No College	Older	Other	6	N	6	Y
7	No College	Young	Latino	7	Y	2	N
8	No College	Young	Other	2	N	2	N

1 Strike the three venire persons with the highest priority scores.
2 Priority Score = add 5 for Latino, add 4 for older, add 2 for non-college educated.
3 Priority Score = add 4 for older, add 2 for non-college educated.

Table 1 shows the application of the hypothetical data to eight venire persons who each have a unique combination of the three relevant attributes. Using model 1, which includes an analysis of the race of the venire persons, the consultant would advise the defendant to strike both of the older Latinos and the younger Latino without a college education. If the consultant refrains from analyzing the correlation between race and authoritarianism, the consultant will follow model 2, and advise the attorney to strike both older venire persons without college educations, and will be indifferent to striking either of the older, college educated venire persons. The older Latino without a college education will not make the jury in either case, and it is therefore unlikely that her constitutional rights have been violated if the consultant uses model

1. For the younger Latino without a college education, however, the two models mean the difference between serving and being struck. In the case of this juror, it is difficult to see how a consultant could argue that the use of multiple classifications satisfies *Batson*'s prohibition.[34]

To generalize from this example, including a constitutionally forbidden category in the analysis will tend to create a different pattern of strikes when race is weighted more heavily than other variables. As the example illustrates, however, this heuristic method will not complete the analysis. Determining when the use of the category will make the difference between using a challenge and not necessitates a thorough review of the consultant's equations and survey data combined with an assessment of the characteristics of venire members.

Until recently, this kind of advice was immune from judicial scrutiny. No judge need worry about conducting the analysis used in the consulting example above. The recent history of constitutional law, as applied to peremptory challenges, however, suggests that many of the demographic techniques used in SJS are not only ethically objectionable, but are also constitutionally impermissible.

III. THE CONSTITUTION AND PEREMPTORY CHALLENGES

In the past few years, the climate surrounding peremptory challenges has changed dramatically. Beginning with *Batson v. Kentucky*,[35] the United States Supreme Court has held that the

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34. Interaction effects present only a slightly more complex analysis. If neither race nor age mean anything by themselves, but a particular age-race combination correlates with the target attitude, then race must be treated as an indispensable component of the analysis.

35. 476 U.S. 79 (1986). For reviews of the *Batson* decision, see Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 167-211 (1989); Douglas L. Colbert, *Challenging the Challenge: The Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 93-101 (1990); William T. Pizzi, Batson v. Kentucky: *Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 971, 138-44 (1987) (arguing that Batson adds too much to the cost of conducting a trial); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection. Whose Right is it Anyway?*, 92 COLUM. L. REV. 725, 725-26 (1992); Gerard G. Brew, Note, *The Civil Implications of* Batson v. Kentucky *and* State v. Gilmore: *A Further Look at Limitations on the*

Fourteenth Amendment prohibits the use of peremptory challenges on the basis of a venire person's race.[36] Although the *Batson* Court limited its prohibition to a prosecutor's use of challenges against members of a cognizable class,[37] recent cases have extended the holding. In *Edmonson v. Leesville Concrete Co.*,[38] the Court held that civil litigants may not exclude jurors from service because of their race.[39] The Court, in *Powers v. Ohio*[40] also relaxed limitations on standing to raise a *Batson* claim against a peremptory challenge.[41] The Court completed the proscription in *Georgia v. McCollum*[42] by requiring that criminal defendants to refrain from indulging in race-based peremptories.[43] After *Batson*, *Edmonson*, *Powers*, and *McCollum*, any party, criminal or civil, defendant or plaintiff, of any race may not use race as a basis for exercising a peremptory challenge. These cases also raise the possibility that the use of other suspect classifications such as gender, religion or ethnicity, are also forbidden by *Batson* and its progeny.[44]

Constitutional scrutiny of the demographic composition of the jury takes two general forms--challenges to the selection of citizens for the venire and challenges to the selection of jurors from the venire. Each issue implicates both the Fourteenth Amendment equal protection rights of the venire persons and the Sixth Amendment due process rights of defendants in criminal trials.[45] Despite a vigorous application of both amendments to venire composition,[46]

Peremptory Challenge, 40 RUTGERS L. REV. 891, 919-69 (1988); Jonathon B. Mintz, Note, Batson v. Kentucky: *A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1031-38 (1987).

36. *Batson*, 476 U.S. at 97.
37. *Id.* at 96.
38. 111 S. Ct. 2077 (1991).
39. *Id.* at 2087.
40. 111 S. Ct. 1364 (1991).
41. *Id.* at 1373-74.
42. 112 S. Ct. 2348 (1992).
43. *Id.* at 2356.
44. *See infra* Section V. B..
45. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. VI.
46. For a review of these cases, see Jon M. Van Dyke, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 85-110 (1977).

the peremptory challenge remained immune from constitutional scrutiny until *Batson v. Kentucky*.[47] In *Batson*, the Court held that by excluding venire persons on the basis of their race, the prosecutor violated the Fourteenth Amendment rights of the excluded venire persons.[48] Although the Court now prohibits prosecutors from using peremptory challenges to exclude jurors on the basis of race, the prohibition arises from the Fourteenth Amendment's Equal Protection Clause and not the Sixth Amendment's requirement of a representative jury. The Court has arrived at this conclusion only after several attempts to balance peremptory challenges against constitutional requirements.[49]

A. Early History of Racial Discrimination and the Sixth Amendment

Beginning with *Strauder v. West Virginia*,[50] the United States Supreme Court has held that the Fourteenth Amendment prohibits states from excluding citizens from jury service on the basis of their race.[51] In *Strauder*, the Supreme Court relied on the amendment's Equal Protection Clause to strike down a West Virginia statute which explicitly excluded blacks from jury service.[52] Similarly, in *Neal v. Delaware*,[53] the Court overturned a race neutral jury selection statute administered in a discriminatory fashion.[54] The Court declared that it would tolerate neither explicit nor implicit schemes which resulted in a complete elimination of blacks' opportunity to serve as jurors.[55]

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47. 476 U.S. 79 (1986).

48. *Id.* at 97.

49. *See infra* notes 301-310 and accompanying text (discussing the balancing of constitutional values with the benefits of peremptory challenges).

50. 100 U.S. 303 (1879).

51. *Id.* at 309.

52. *Id.*

53. 103 U.S. 370 (1879).

54. *Id.* at 397. Although the Delaware juror selection statute did not discriminate against blacks explicitly, its state officials simply refused to allow blacks to serve on juries. *Id.*

55. *Id.*

It took the Court another fifty-five years to extend the scope of the Equal Protection Clause to cover jury selection schemes that reduce, but do not eliminate, the eligibility of blacks to serve in venire panels. In *Norris v. Alabama*,[56] the Court asserted that a defendant could make out a prima facie case of discriminatory intent if he could demonstrate that a jury selection procedure results in substantial underrepresentation of blacks in the jury venire.[57] After such a showing, the prosecution must provide an acceptable race-neutral explanation for the disparity or the district court must assume that the scheme violates the Sixth and Fourteenth Amendment rights of the defendant.[58] In more recent cases, the Court has closely scrutinized states' explanations for racially unrepresentative jury venires.[59] The Court has held that the Sixth and Fourteenth Amendments require that jury service statutes employ selection mechanisms designed to produce representative jury venires.[60]

The Court has balked at extending the above rulings to the use of peremptory challenges. In *Swain v. Alabama*,[61] the Court refused to overturn the conviction of a defendant who objected to a prosecutor's use of peremptory challenges to exclude black jurors.[62] The defendant in *Swain* claimed that the Sixth Amendment and the *Strauder* precedent prohibited a prosecutor from using peremptory challenges in a calculated attempt to eliminate black jurors.[63] While agreeing that the Sixth Amendment requires that the defendant's jury be drawn from a venire which contains a representative cross section of the community, the Court held that a defendant is not entitled to a

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56. 294 U.S. 587 (1935).

57. *Id.* at 591-593.

58. *Id.* at 597-99. For a more detailed account of the early cases dealing with Fourteenth Amendment challenges to the composition of the venire, see VAN DYKE, *supra* note 46, at 85-100 (1977).

59. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 492-500 (1977); Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 330 (1970); Avery v. Georgia, 345 U.S. 559, 561-62 (1953).

60. But some commentators criticize these cases by noting that jury venires still fail to represent the community adequately. *See, e.g.*, VAN DYKE, *supra* note 46, at 156-60.

61. 380 U.S. 202 (1965).

62. *Id.* at 226-28.

63. *Id.* at 226.

perfect cross section on the ultimate jury.[64] Writing for the majority, Justice White's opinion defers to the cherished place unexplained peremptory challenges have occupied in the history of American law.[65] He asserted that a prima facie case of discriminatory use of peremptory challenges could only be made if a defendant can demonstrate a long-standing pattern of systematic exclusion.[66]

Swain preserved the status of peremptory challenges as unexplained strikes. This holding prevented lower courts from delving into the motivations for peremptory challenges in specific cases and instead required them to focus on the behavior of a prosecutor across a large number of cases. The Court ostensibly preserved the Sixth Amendment rights of the defendant by allowing lower courts to review historic evidence for a pattern of systematic exclusion. In practice, however, *Swain* had little effect on racism in jury selection.[67] Upon reviewing the facts in *Swain*, Justice White could not find sufficient evidence to support a prima facie case of racial discrimination,[68] even though the venue, Talladega County, Alabama, had never seen a black juror.[69] Many commentators concluded that no pattern of abuse would satisfy the Court's test.[70] Indeed, despite numerous attempts, only two defendants since *Swain* have managed to demonstrate a prima facie case of discriminatory use of peremptory challenges violating the Sixth Amendment.[71]

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64. *Id.* at 208.
65. *Id.* at 212-222.
66. *Id.* at 223-24.
67. *See, e.g.*, VAN DYKE, *supra* note 46, at 150-52.
68. *Swain*, 380 U.S. at 227.
69. *Id.* at 223.
70. VAN DYKE, *supra* note 46, at 156-60. One court labeled the attempts to prove systematic exclusion as "mission impossible." McCray v. Abrams, 750 F.2d 1113, 1120 (2d Cir. 1984).
71. *See* State v. Brown, 371 So. 2d 751 (La. 1979); State v. Washington, 375 So. 2d 1162 (La. 1979).

B. Questioning Peremptory Motivations: Batson v. Kentucky

Having effectively eliminated Sixth Amendment attacks on peremptory challenges, the Court revisited this issue in *Batson v. Kentucky*.[72] In *Batson*, a black defendant had been convicted by an all-white jury in a county which had not seated a black juror in over a decade. Rather than overruling *Swain*, the Court relied on the Fourteenth Amendment to overturn *Batson*'s conviction.[73] Writing for the majority, Justice Powell upheld the overwhelming burden of proof *Swain* created for a Sixth Amendment cross-section complaint.[74] *Batson* held that the Kentucky prosecutor's use of race-based peremptory challenges violated the venire persons' guarantee of equal protection under the Fourteenth Amendment.[75] Furthermore, the Court ruled that because of the low probability that excluded venire persons will raise a case to defend their rights to serve, and because of the special relationship between the accused and the jurors, the defendant had standing to raise the constitutional claims of excluded venire persons.[76] The Court's decision in *Swain* makes it virtually impossible for a defendant to attack race-based peremptory challenges with the Sixth Amendment. After *Batson*, however, a criminal defendant has special standing to enforce the Fourteenth Amendment rights of the venire persons.[77]

The *Batson* Court reached its decision by reference to *Strauder* and its progeny.[78] The Court affirmed its position that although a criminal defendant has no right to be tried by a jury which is composed of persons of his own race,[79] the Equal Protection Clause does give him "[t]he right to be tried by a jury whose

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72. 476 U.S. 79 (1986).
73. *Id.* at 92-93.
74. *Id.* at 93.
75. *Id.* at 89.
76. *Id.*
77. Alschuler, *supra* note 35, at 167-73.
78. *Batson*, 476 U.S. at 85-100.
79. *Id.* at 85 (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1880)).

members are selected pursuant to non-discriminatory criteria."[80] Furthermore, in the *Batson* majority, Justice Powell asserted that discrimination in the selection of jurors harms the community and the rights of the venire persons as well as the rights of the defendant.[81] Powell wrote that "[t]he State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at other stages in the selection process."[82] Thus, the *Batson* Court held that although peremptories normally stand as unexplained challenges, the Fourteenth Amendment requires that on occasion, the state divulge its motivations to ensure that race does not factor into the selection process.

Batson also describes those circumstances in which the Fourteenth Amendment demands a race-neutral explanation from a prosecutor. A prosecutor must provide an explanation for a peremptory challenge if the defendant can demonstrate a prima facie case of purposeful discrimination in selection of the petit jury.[83] To make out a prima facie case under *Batson*, the defendant must "show that he is a member of a cognizable racial group, and that the prosecutor has exercised challenges to remove from the venire members of the defendant's race."[84] The defendant may rely upon the fact that peremptory challenges make discrimination possible for those who are "of a mind to discriminate."[85] Finally, the defendant must show that the circumstances surrounding the use of the peremptory challenge suffice to "[r]aise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[86] In determining whether the facts justify an inference of discrimination, *Batson* directs district courts to assess the "totality of the circumstances" surrounding the exercise of the challenges.[87]

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80. *Id.* at 85-86 (citing Martin v. Texas, 200 U.S. 316, 321 (1906)); *Ex parte* Virginia, 100 U.S. 339, 345 (1880).
81. *Batson*, 476 U.S. at 87.
82. *Id.*
83. *Id.* at 97.
84. *Id.* at 96.
85. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
86. *Id.*
87. *Id.* at 96-97.

This totality includes, but is not limited to, scrutiny of the statements made by the prosecutor, questions asked during voir dire and the pattern of strikes used by the prosecutor.[88] Once the defendant makes a prima facie case, a prosecutor may defend the challenges by providing an acceptable race-neutral explanation for the strike or strikes.[89]

Although it created a means of attacking peremptory challenges, the *Batson* Court limited the scope of its decision. First, the opinion explicitly restricts the challenge to strikes against members of "cognizable racial groups."[90] *Batson* involved black venire persons, but later courts extended protection to include other groups, such as Latinos[91] and Native Americans.[92] *Batson* challenges based on other demographic characteristics, however, such as ethnicity or gender have not fared as well in lower courts.[93] Second, *Batson* reserves the challenge for defendants who share the race of the excluded venire person.[94] This limitation lead several lower courts to reject attempts by whites to raise a *Batson* claim when the prosecutor struck black venire persons.[95] Finally, the *Batson* majority consistently refers to prosecutors, leading some courts to infer that *Batson* does not apply to civil trials,[96] or to a defendant's peremptory challenges.[97]

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88. *Id.* at 97.

89. *Id.*

90. *Id.* at 96 (quoting Castaneda v. Partida, 430 U.S. 482, 494 (1977)) (defining "cognizable racial group").

91. *See, e.g.*, Hernandez v. New York, 111 S. Ct. 1859, 1866-67 (1991).

92. United States v. Bedonie, 913 F.2d 782, 794-95 (10th Cir. 1990); United States v. Roan Eagle, 867 F.2d 436, 441 (8th Cir. 1989); United States v. Chalan, 812 F.2d 1302, 1313-14 (10th Cir. 1987).

93. *See infra* notes 247-300 and accompanying text (discussing lower courts treatment of gender and ethnicity oriented claims).

94. *Batson*, 476 U.S. at 96.

95. *See, e.g.*, United States v. Anguilo, 847 F.2d 956, 959 (1st Cir. 1988).

96. Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077, 2081 (1991).

97. *See, e.g.*, Georgia v. McCollum, 405 S.E.2d 688 (Ga.), *rev'd*, 112 S. Ct. 2348, 2359 (1992).

C. *Extending* Batson: Powers, Edmonson *and* McCollum.

In the 1990 term, the Supreme Court had the opportunity to reassess *Batson*'s limitations. In *Powers v. Ohio*,[98] a white defendant objected to a prosecutor's peremptory challenges to black venire persons, demanding that the judge compel an explanation for the challenges.[99] Powers, a white man accused of murder in Franklin County, Ohio, protested the prosecution's use of peremptory challenges against seven black venire persons.[100] Powers demanded that the prosecutor provide a race-neutral explanation for these challenges, but the trial court ignored his objection.[101] Powers was convicted and he appealed.[102] On review, the Supreme Court held that Powers had standing, despite the fact that his race did not match that of the challenged jurors.[103] In arriving at its conclusion, the Court relied on much of the rationale supporting *Batson*. Quoting *Batson*, the majority opinion explains that when race serves as a basis for peremptory challenges, the entire community suffers.[104] The court explained that "*Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large."[105] Since the harm to the venire persons and the community does not depend on the race of the defendant, any defendant may assert standing to challenge the prosecutor's actions. Although the defendant's race might bear upon an inference of racial motivation, it cannot now preclude standing to raise the issue.[106] The *Powers* decision, therefore, condemns race-based peremptories in any form, for any cause.

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98. 111 S. Ct. 1364 (1991).
99. *Id.* at 1366.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1373-74.
104. *Id.* at 1368.
105. *Id.* (citing *Batson*, 476 U.S. 79, 87) (the Court expressed the concern that biased jury selection procedures "undermine public confidence in the fairness of our system of justice").
106. *Id.* at 1373.

Similar logic underlies the Court's expansion of *Batson* to civil trials in *Edmonson v. Leesville Concrete Co.*[107] In *Edmonson*, a black plaintiff filed a personal injury suit against the Leesville Concrete Company.[108] During jury selection, the defendant used two of his statutorily allowed three peremptory challenges to exclude black venire persons.[109] Citing *Batson*, Edmonson's attorney demanded that the defendant articulate a race-neutral reason for their use of these two challenges.[110] With the backing of the district court, the defendant refused, and the trial court eventually impanelled one black and eleven white jurors.[111] Edmonson received a favorable verdict, but the jury declared him eighty percent responsible for his injuries and thereby awarding him only twenty percent, or $18,000, of his damages.[112] On appeal, Edmonson argued that *Batson* should apply to civil as well as criminal trials.[113] After the Fifth Circuit, en banc, agreed with the trial court,[114] Edmonson appealed to the Supreme Court. The Court reversed the Fifth Circuit and remanded the case for a determination as to whether Edmonson could make out a prima facie case of racial discrimination.[115]

The Court had two hurdles to clear before it could extend the *Batson* rule to civil trials--the state action limitation on the Fourteenth Amendment and the standing of a civil litigant to raise constitutional rights of venire persons. In order to invoke the Equal Protection Clause of the Fourteenth Amendment, an individual must have suffered disparate treatment at the hands of a state official or someone acting under the color of state action.[116] *Batson* does not address this issue, since a prosecutor falls well

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107. 111 S. Ct. 2077 (1991).
108. *Id.* at 2080.
109. *Id.* at 2081.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077, 2081 (1991).
115. *Edmonson*, 111 S. Ct. at 2081.
116. *Id.* at 2082.

within the ambit of state action.[117] The defendant in *Edmonson* argued that civil litigants are private actors who need not answer to the Fourteenth Amendment in any aspect of case preparation.[118] Writing for the majority in *Edmonson*, Justice Kennedy characterized civil litigants as partial state actors.[119] He argued that since peremptory challenges require the machinery of a court, exercise of such challenges closely approximates state action.[120] Kennedy relied upon a close analogy between the use of peremptory challenges and the hiring decisions of other government officials.[121] Kennedy noted that if the government gave a private body power to choose government employees or officials, such a private body would be bound by the principle of race-neutrality.[122] Kennedy argued that, in choosing a jury, both the government and the private litigants have the same goal.[123] The substantial entanglement between the litigants and the government, which occurs during jury selection, led the *Edmonson* majority to conclude that the exercise of peremptory challenges constitutes sufficient state action to require Fourteenth Amendment scrutiny.[124]

Once past the state action barrier, the *Edmonson* Court considered whether a civil litigant could raise the equal protection claims of the excluded jurors.[125] Comparing the civil and criminal spheres, the Court found no differences in the three elements which allow a litigant to raise the equal protection claim.[126] The Court first noted that *Powers*, which held that persons who were excluded from jury service were effectively unable to protect their own

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117. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 608 (1985) (holding that prosecutorial discretion must comport with the constraints of the Equal Protection Clause.)

118. *Edmonson*, 111 S. Ct. at 2081.

119. *Id.* at 2082-87.

120. *Id.*

121. *Id.* at 2085-86.

122. *Id.* at 2085 (citing National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192-93 (1988); Rendell-Baker v. Kohn, 457 U.S. 830 (1982)).

123. *Id.* at 2086.

124. *Id.*

125. *Id.* at 2087.

126. *Id.*

rights, also applied to civil trials.[127] Similarly, the Court held that the relationship between the excluded venire persons and the litigant challenging the exclusion was as close in the civil context as in a criminal context.[128] Finally, the Court recognized that a civil litigant is harmed by an opponent's discriminatory use of peremptory challenges since such challenges implicate that the judicial process is less than fair.[129] Convinced that a civil litigant facing race-based peremptory challenges satisfies these requirements for third party standing, the Court held that courts must hear challenges brought by private litigants regarding racially discriminatory peremptory challenges in civil trials.[130]

Similar considerations lead the Court to extend *Batson*'s prohibition against race-based peremptories to criminal defendants. In *Georgia v. McCollum*,[131] the Court distinguished earlier precedent, which held that, in the ordinary course of their representation, criminal defense attorneys are not state actors.[132] The *McCollum* Court held that defense attorneys can be state actors, depending upon the nature of the activity they are performing.[133] Writing for the majority, Justice Blackmun relied on the similarity between state hiring decisions and peremptory challenges: the same argument Justice Kennedy used in *Edmonson*. After rejecting arguments that defendants have different status than civil litigants,[134] the Court held that prosecuting attorneys have

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127. *Id.*

128. *Id.*

129. *Id.* (quoting Powers v. Ohio, 111 S. Ct. 1364, 1365 (1991); Rose v. Mitchell, 443 U.S. 545, 556 (1979)).

130. *Id.* at 2088.

131. 112 S. Ct. 2348 (1992).

132. *Id.* at 2355 (citing Polk County v. Dodson, 454 U.S. 312 (1981)).

133. *Id.*

134. For a full discussion of the relevant issues, see Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989) (concluding that *Batson* should not apply to a criminal defendant's peremptory challenges); J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 SO. CAL. L. REV. 1015 (1990) (concluding that both legal and normative arguments exist for extending *Batson* to criminal defendants); John J. Hoefner, Note, *Defendant's Discriminatory Use of Peremptory Challenges After* Batson v. Kentucky, 62 ST. JOHN'S L. REV. 46 (1987) (concluding that *Batson* should apply to criminal defendants); E. Vaughn Dunnigan, Note, *Discrimination by the Defense: Peremptory Challenges After* Batson v. Kentucky,

sufficient standing to raise the Fourteenth Amendment rights of the venire persons.[135] Although four justices questioned the wisdom of the Court's new line of post-*Batson* precedent,[136] the opinion echoes *Edmonson* and *Powers*, and re-affirms these holdings.

Thus, the Court has expanded the rights of those summoned for jury duty. After *Powers*, *Edmonson*, and *McCollum*, the Equal Protection Clause protects all venire persons from being excluded from service on the basis of their race.

IV. EDMONSON, POWERS, MCCOLLUM AND SCIENTIFIC JURY SELECTION

None of the hundreds of appeals resulting from *Batson* involves SJS. Like *Batson*, most of these cases are appeals from peremptory challenges exercised by prosecutors, a group which seldom uses SJS. Now that the Supreme Court has forbidden race-based peremptories in civil cases and by defense attorneys, SJS may result in some case law. Some of the unique characteristics of a peremptory challenge originating from an SJS consultant make it particularly likely to draw the attention of a court. Although these peculiarities also raise questions concerning the applicability of the *Batson* case to SJS methods, SJS probably does not escape constitutional scrutiny.

A. Special Difficulties Raised By SJS

Under the new Supreme Court cases, *Batson* challenges present two unique problems for SJS consultants and their clients. First, since SJS has a history of using race as a marker in demographic

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88 COLUM. L. REV. 355 (1988) (arguing that the Equal Protection Clause and community beliefs in fair trials requires that *Batson* extend to criminal defendants); Michael Sullivan, Note, *The Prosecutor's Right to Object to a Defendant's Abuse of Peremptory Challenges*, 93 DICK. L. REV. 143 (1988) (concluding that *Batson* applies to criminal defendants).

135. *McCollum*, 112 S. Ct. at 2356.

136. Justices O'Connor, Scalia, and Thomas dissented outright, while Chief Justice Rehnquist concurred only insofar as the result followed from *Batson* and *Edmonson*, which he believes should be overturned.

surveys which support peremptory challenges,[137] the mere fact of employment of an SJS consultant can raise the presumption of unconstitutional, race-based peremptory challenges. This objection could result in intense judicial scrutiny of the basis for peremptory challenges. Second, SJS creates a paper trail for a court to follow. The attorney employing an SJS consultant who has used race in a demographic survey will be hard pressed to avoid a successful *Batson* challenge. Without SJS, the attorney is free to point out characteristics of challenged venire persons other than race and to assert that race played no part.[138] Forced to disclose the results of a demographic survey which includes race, an attorney could not credibly make such a claim.

1. Raising the Inference of Race Based Challenges

As a first step in challenging a peremptory challenge under *Batson*, a litigant must make a prima facie showing that the opponent has used peremptory challenges to eliminate venire persons on the basis of their race.[139] In determining whether the litigant has adduced evidence sufficient to support such a showing, trial courts should consider the circumstances surrounding the exercise of the peremptory challenges.[140] Much of the litigation resulting from *Batson* concerns the nature of the initial showing which would constitute a prima facie case of discriminatory use of peremptory challenges.[141] The Supreme Court has consistently deferred to the lower courts for litigation which fleshes out the facts needed to support a prima facie claim.[142] In implementing

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137. Virtually every published description of SJS describes its reliance on such surveys. *See supra* note 5 (providing authorities discussing SJS methodology).

138. Many have criticized *Batson*'s enforcement scheme because of the opportunity it affords prosecutors to invent pretextual justifications for overtly race-based peremptory challenges. *See, e.g.*, Alschuler, *supra* note 35, at 199-201; Mintz, *supra* note 35, at 1036-38.

139. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

140. *Id.* at 97.

141. *See* Alschuler, *supra* note 35, at 170-73.

142. *Batson*, 476 U.S. at 97 ("We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors."); Powers v. Ohio, 111 S. Ct. 1364, 1374 (1991) ("It remains for trial courts to develop rules, without unnecessary disruption

Batson, lower courts have used a variety of methods to determine when a defendant has made out a prima facie claim of discrimination, which can include holding hearings and examining evidence, such as a prosecutor's notes during voir dire. Courts have held that the failure to inquire into the basis for peremptory challenges with sufficient vigor can constitute reversible error.[143] Such rulings oblige trial courts to engage in a reasonably diligent inquiry into the basis for a *Batson* challenge.

In the case of SJS, diligent inquiry could require a judge to delve into the details of the psychological consultation. Even with the publications available on SJS, the public catches only glimpses of the details of SJS methods. SJS consultants rarely disclose the results of their investigations and procedures in academic and professional journals. Client confidentiality also obfuscates a real understanding of SJS. Given SJS's history, when faced with evidence that an attorney has employed an SJS consultant, the trial judge faces a situation where the best guess is that the peremptory challenges result in part from the race of venire persons.[144] Diligent inquiry requires that a judge demand to see the results of the SJS consultation. Thus, a litigant employing SJS should be prepared to disclose the results of this research to the judge.[145]

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of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice").

143. *See, e.g.*, United States v. Alcantar, 897 F.2d 436, 440 (9th Cir. 1990) (failure to hold hearing to determine motive for peremptory challenge when prima facie case had been made held to be reversible error).

144. Although SJS consultants hide the details of their activities, they often reveal their activities to the public as occurred in the William Kennedy Smith case. *See* David Margolick, *Palm Beach Rape Trial Faces Test: Finding Jury*, N.Y. TIMES, Oct. 31, 1991, at B8.

145. The work-product doctrine, which protects an attorney's preparations for litigation, probably shields the details of SJS consulting from an opponent's scrutiny. *See, e.g.*, Herbsleb et al., *supra* note 1, at 204-05 (concluding that the results of SJS are protected). *But see* Moskitis, *supra* note 5, at 630-33 (concluding that juror studies fall within the "unfair prejudice" exception to work product). This shield, if it exists, would not bar an in camera examination of SJS materials by the judge. *See, e.g.*, United States v. Zolin, 491 U.S. 554, 568 (1989) ("disclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege."); United States v. Nobles, 422 U.S. 225, 236-39 (1975); Federal Sav. and Loan Ins. Corp. v. Ferm, 909 F.2d 372, 274 (9th Cir. 1990) ("In camera review protects the attorney's private thoughts from 'intrusion by opposing parties and counsel' and hence protects those interests which lie at the heart of the attorney work product doctrine.") (quoting United States v. Nobles, 422 U.S. 225, 236-39 (1975); Hickman v. Taylor, 329 U.S. 495, 510-11

Since no cases exist at this time which discuss the issue the applicability of *Batson* to SJS, a litigant employing SJS should consider disclosing the nature of the consultation to the judge voluntarily. This would permit the judge to approve the peremptory challenges, thereby preempting or reducing the chances for an appeal based on *Batson*. Even if the SJS consultant has refrained from using forbidden classifications, the widespread use of suspect classifications in SJS makes the consultation suspect. Absent a widespread disavowal of the use of these classifications within the field, even the innocent SJS consultants remain suspect. On the other side of the courtroom, litigants who suspect that their opponent has employed an SJS consultant should object to the opponent's first peremptory challenge. The litigant can then argue that since SJS historically uses classifications forbidden under *Batson* and its progeny, each peremptory challenge has an unconstitutional element. A judge who agrees will then review the SJS materials, thereby exposing the opponent to judicial scrutiny and possible sanctions to remedy the use of forbidden classifications.[146] Even if the judge dismisses the objection without inquiry, the issue is preserved for appeal.

2. *SJS as a Paper Trail*

If the SJS consultant has used race in a demographic survey, then an attorney will find it difficult to avoid a *Batson* challenge. Demographic surveys generate a complete, written documentation, to which a judge can demand access. Like most social scientists, SJS consultants enter the results of their surveys into statistical computer packages. These packages allow social scientists to summarize their data quickly and effectively, but they also create paper trails which any court could follow easily. If aware of the SJS techniques, a judge would demand an interpretation of

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(1947)).

146. If the consultant has not used race, then the judicial review itself is the strongest remedy. *See infra* notes 149-157 and accompanying text (outlining possible remedies for SJS's use of race-based classifications).

statistical printouts which would make it impossible to hide the use of race in a demographic survey without committing outright perjury. This paper trail eliminates one of the most troublesome enforcement issues in *Batson*'s command of race-neutrality. Without SJS, litigants may refer to any characteristic of the venire person to justify their challenge.[147] With SJS, a judge has but to examine the memoranda from the SJS consultant or to review the statistical procedures to uncover the basis for the challenges.

An attorney could deny relying on the SJS consultant exclusively. In fact, attorneys probably do not blindly follow an SJS consultant's advice.[148] The attorney could state that the peremptory challenge is based on intuition or advice other than the SJS consultant, but the trial judge remains free to disbelieve the attorney. This situation leaves an attorney with the difficult task of convincing a judge that she or he paid good money for an SJS consultant, only to resort to intuition at the last minute. Even if the judge accepts the attorney's disavowal, the SJS consultant's use of race will result in some uncomfortable moments in the courtroom.

3. *Remedying SJS's Use of Race*

In *Batson*, the Supreme Court referred to two possible remedies to a race-based peremptory challenge. The trial court could either "discharge the venire and select a new jury from a panel not previously associated with the case" or "disallow the discriminatory challenge and resume selection with the improperly challenged juror reinstated on the venire."[149] These two options are the most

147. Prosecutors sometimes face similar difficulties when trying to hide notes on their jury selection plans. *See, e.g.*, United States v. Nicholson, 885 F.2d 481, 482 (8th Cir. 1989).

148. In one famous documentation of SJS, the trial of Joan Little, the defense attorney reported using several sources of advice in addition to an SJS demographic survey, including a psychic who claimed to read the auras of the potential jurors. John B. McConahay et al., *The Use of Social Science in Trials With Political and Racial Overtones: The Trial of Joan Little.* 41 L. & CONTEMP. PROBS., 205, 219 (1977).

149. Batson v. Kentucky, 476 U.S. 79, 100 n.24. Both of these remedies present difficulties for the courts. *See* Alschuler, *supra* note 35, at 177-79. Selecting an entirely new jury is an expensive solution. Reinstating the venire person essentially results in empaneling a juror who has now had an adversarial experience with one of the litigants. The experience of being struck due to one's race and then being reinstated may bias that juror against the litigant who struck him or her.

common remedies to the improper use of a peremptory challenge, but courts may devise other remedies as well.[150] A trial court could conceivably order the selection of a new panel and deny the offending attorney the use of any further peremptory challenges.[151] Any of these possible remedies results in the SJS consultant burdening the client with additional time and expense. At best, the attorney must defend each peremptory challenge against a presumption that it was motivated by race.[152] At worst, the judge can restrict or eliminate the attorney's use of peremptory challenges.[153]

The current status of peremptory challenges poses difficulties even for SJS consultants who eschew suspect classifications. Under *Batson* and its progeny, a judge must inquire into the basis for a peremptory challenge whenever a litigant makes a prima facie demonstration that race inspired the challenge.[154] Given SJS's reliance on race, the mere employment of an SJS consultant should create a sufficient basis for a prima facie case and demand further inquiry. Establishing a prima facie case requires the judge to inquire further into the basis for the challenge.[155] Ordinarily, a judge will simply ask the attorney to justify the challenge.[156] If collateral evidence exists, such as written notes, a judge may demand to see it.[157] An attorney who has hired an SJS consultant has inadvertently created an extensive paper trail for a judge to follow. In preparing advice, SJS consultants create detailed data analyses and summary memoranda which describe their predictions

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150. Improper advice from an SJS consultant presents even greater difficulties for a court, since the advice alters the entire pattern of strikes. Alschuler, *supra* note 35, at 177-79.

151. Peremptory challenges are "creatures of statute," not part of proceedings mandated by due process. Ross v. Oklahoma, 487 U.S. 81, 88 (1988). A Maryland state court judge recently ordered a that a new jury be selected after learning that one of the plaintiffs in a large asbestos case erroneously sent a fax describing SJS strategies to one of the defendants. Liz Spayd, *Another Snag Hits Maryland Asbestos Case: Misdirected Fax Prompts Manufacturers' Lawyer to Seek Mistrial*, WASH. POST, May 31, 1991, at D1.

152. As required in *Batson*, 476 U.S. at 96-97.

153. *See* Alschuler, *supra* note 35, at 177-79.

154. *See supra* notes 83-88 and accompanying text.

155. *See supra* notes 87-789 and accompanying text.

156. *See supra* note 83 and accompanying text.

157. *See, e.g.*, United States v. Nicholson, 885 F.2d 481, 482 (8th Cir. 1989).

and conclusions. A judge may demand to see all of this material. In fact, to the extent that *Batson* requires a diligent inquiry into the basis for peremptory challenges, a judge may be obligated to review such documentation. These materials may well demonstrate that challenges have been exercised properly, and that the consultation steered clear of racial classifications, but an attorney might find such an inquiry uncomfortable. After *Batson* and *Edmonson*, employment of any version of SJS invites judicial scrutiny.

B. Arguments that Batson *Challenges do not Apply to SJS*

A peremptory challenge resulting from the advice of an SJS consultant probably does not differ from conventional peremptory challenges in most constitutionally significant respects. SJS does, however, pose unique equal protection questions for courts. Social scientists can make several arguments against the application of *Batson* to their efforts to assist litigants in their jury selection. These arguments and the responses thereto will be discussed in the following sections.

1. SJS Employs Race only as a Surrogate for Attitudes

As discussed, the Equal Protection Clause protects groups formed by race, but not by attitudes. In fact, SJS depends on finding attitudes which covary with race to predict juror's responses to a case, not on the attitude of specific racial groups towards the litigants. The social scientist who conducts a community survey is not interested in the responses of various protected groups to the defendant except inasmuch as the responses identify individuals who hold certain attitudes or opinions which that researcher believes would be harmful to the client's case. The SJS consultant does not recommend striking black or white venire persons out of fear that these groups are biased against the client's case, but because they are more likely to hold specific attitudes. The litigants who use SJS can articulate a race-neutral explanation for the exercise of a peremptory challenge: They can assert that the

challenged venire person is likely to hold an attitude that favors their opponent. The venire person's race merely marks the presence or absence of the targeted attitude. At least one lower court case supports this position. In *United States v. Clemmons*,[158] the prosecutor struck an Asian Indian venire person, giving as his justification his belief that the juror was "probably a Hindu, and Hindus have different feelings about these things."[159] Some confusion about the actual race of the juror existed, and the appeals court decided that, for the purposes of appeal, they had to consider the venire person as a black person and apply *Batson*'s analysis to the prosecutor's explanation.[160] The court ruled that since the prosecutor's motivations for the challenge did not arise from an intent to discriminate against black venire persons, then the equal protection clause was satisfied.[161] The court, in effect, permitted the prosecutor to make an assumption based on the race of the venire person, since the prosecutor inferred religious practice from venire person's race. Although the confusion as to the race of the venire person limits the value of the case as precedent, it permitted the use of race as a proxy under the theory that *Batson* only forbids discriminatory intent.

The argument used in *Clemmons* does not save SJS from equal protection scrutiny. Litigants using SJS ultimately make their challenges in part because the venire person is a certain race. A case from the Tenth Circuit directly addresses this SJS technique. In *United States v. Brown*,[162] the prosecutor expressed concern that the defense attorney was a prominent leader in the black community and, as such, black jurors would have considerable respect and affinity for him.[163] This prosecutor used the race of the venire persons as his marker for this affinity.[164] He did not strike black venire persons out of pure bigotry, but because of the

158. 892 F.2d 1153 (3d Cir. 1989), *cert. denied*, 496 U.S. 927 (1990).
159. *Id.* at 1156.
160. *Id.*
161. *Id.* at 1157.
162. 817 F.2d 674, 676 (10th Cir. 1987).
163. *Id.* at 675.
164. *Id.* at 675-76.

currency the defense attorney might hold with them.[165] As the Tenth Circuit held, "[w]hile the [*Batson*] rule interdicts the exercise of peremptory challenges for purely racial reasons, it does not forbid challenges of minority jurors for legitimate reasons tangentially connected with their race. But such a linkage cannot be assumed just because of racial identity."[166] In *Clark v. City of Bridgeport*,[167] an application of *Batson* to a civil rights case, a government attorney used his peremptory challenges to eliminate blacks on the grounds that the defendant had "poor rapport" with blacks in the community.[168] The trial judge rejected this argument as a failure to articulate a race neutral principle for using the peremptory challenge.[169] Both *Brown* and *Clark* demonstrate that *Batson* forbids the use of race as a marker or proxy for attitudes which will affect the juror's disposition towards the case. *Brown*, *Clark* and SJS present different versions of the same basic story--use of race as a marker. SJS differs from conventional jury selection regarding the basis for predicting the biases which correlate with race, but not in the implementation of these predictions.

Furthermore, the author of *Powers* and *Edmonson*, Justice Kennedy, asserts that the proper method for ferreting out biases and prejudices of potential jurors is voir dire.[170] Kennedy asserts that a litigant may explore "biases and instincts in a rational way that consists with respect for the dignity of persons, without the use of classification based on ancestry and skin color."[171] Also, *Edmonson* holds that "[w]hether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and unarticulated fear, neither entitles the

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165. *Id.* at 675.
166. *Id.* at 676.
167. 645 F. Supp. 890 (D. Conn. 1986).
168. *Id.* at 893.
169. *Id.* at 894.
170. *Edmonson*, 111 S. Ct. at 2088. Kennedy explained: "The quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes." *Id.*
171. *Id.*

litigant to cause injury to the excused juror."[172] Thus, although he addresses the more direct concern that peremptory challenges not be used merely based on the belief that certain races will react in specific ways to the litigants, Kennedy uses language which would include the use of race as a proxy for any attitude relevant to the litigation.[173]

One other recent Supreme Court case involving a *Batson* challenge, *Hernandez v. New York*,[174] comes closest to addressing the issue of race as a proxy. In *Hernandez*, the Court upheld a prosecutor's use of peremptory challenges against bilingual, Latino jurors.[175] The Court argued that the prosecutor did more than offer a bald assumption concerning Latino jurors or even of bilingual jurors.[176] The prosecutor apparently asked each bilingual juror if they would be able to ignore their abilities and attend to a translation of Spanish speaking witnesses rather than the actual statements of the witnesses.[177] This prosecutor asserted that he struck these jurors because of their hesitancy in answering his voir dire inquiries.[178] The *Hernandez* majority opinion observed that the case would be different if the prosecutor's justification for the peremptory challenges was that he did not want Spanish speaking jurors.[179] The prosecutor's efforts to strike the undesirable characteristic without making assumptions saved the conviction.

To defend SJS, an advocate would have to assert that the harm caused by employing a racial stereotype in jury selection can differ depending upon the basis for the litigant's generalization. An SJS advocate would argue that they do not demean venire persons through the use of race because they know which jurors are likely

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172. *Id.*

173. This analysis ignores the possibility that jurors will be evasive during voir dire when questioned about bias or prejudice. Although Justice Kennedy does not address this issue, perhaps his reference to the "quiet rationality of the courtroom" means that litigants must rely on their own cross examination skills, along with the threat of perjury, to obtain honest answers from the venire persons.

174. 111 S. Ct. 1859 (1991).

175. *Id.* at 1867.

176. *Id.*

177. *Id.* at 1864-65.

178. *Id.* at 1865.

179. *Id.* at 1872.

to hold favorable or unfavorable attitudes. The harm to the venire person does not, however, depend upon the source of the stereotype. The litigant using an SJS race based challenge has made a generalization as to the attitudes and prejudices that a venire person holds, merely on the basis of an individual's race.

Part of the concern with the race-based stereotypes in *Edmonson* and *Powers* arises from the fact that a litigant can use voir dire to search for the potential bias. When Justice Kennedy recommends that the concern for prejudice be addressed in the "quiet rationality of the courtroom," SJS should pay heed. If the argument for SJS is that it serves as a proxy for an attitude, a court could ask why the litigant does not use race simply to decide whether to question the prospective jurors as to whether they hold the attitude, rather than summarily excluding them via peremptory challenge.[180]

2. *SJS as a Race Neutral Process*

The litigant using SJS can argue that SJS is inherently a race neutral procedure. The litigant has no interest in eliminating jurors of a specific race until research demonstrates that race predicts attitudes relevant to the trial. The collection and analysis of survey data is race-neutral. In SJS, a blind statistical process determines the peremptory challenges. Unlike traditional jury selection, the litigant using SJS has no prior conception of what attitudes and biases are held by various races. SJS consultants approach the litigation with an open mind and let the data determine which venire persons to exclude. Traditional jury selection contains far more room for racial stereotypes than does SJS.

As support for this argument, social scientists can rely on *Lockhart v. McCree*.[181] McCree contested the constitutionality of

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180. Justice Kennedy ignores a restriction common to voir dire. For example, in Federal Court, the trial judge generally conducts the voir dire, and does not allow attorneys to ask questions by themselves. *See* Bermant & Shapard, *supra* note 20, at 81-87.

181. 476 U.S. 162 (1986).

his death qualified jury,[182] in part, by arguing that the jurors excluded in such a process are more likely to be minorities and women.[183] In upholding the death qualification process, the majority stated that the disparate impact of death qualification had no constitutional significance since it was an unintentional consequence.[184] Likewise, an advocate can characterize SJS as a neutral process with some disparate effects.

Unlike the judge who death qualifies a jury, an SJS consultant decides to use race deliberately. If used in a large number of cases, SJS might be thought of as merely having a disparate impact, but in a single case, its effect is deliberately disproportionate. The empirical aspect of SJS makes such a practice even more suspect, since the demographer spends time and effort creating a racial generalization. SJS consultants use race in demographic profiles in the hope of finding some characteristic which will covary with an attitude, thereby making it a reliable predictor of verdict choice. That this practice visits harm on races at random or that each race is equally likely to suffer under it can be no defense.[185] An appropriate analogy to this situation would be if a school district decided to offer two types of reading classes, one advanced and one normal. In deciding which students belong in which class, the district decides that the classes must be racially homogenous and as a result, decides to offer the advanced class to students of whichever race scores highest on a reading test. Any court applying equal protection scrutiny would find either SJS or the hypothetical school test equally objectionable.

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182. Capital trials are traditionally bifurcated; a jury first determines the guilt or innocence of the defendant in one proceeding, and then a second jury decides whether to apply the death penalty. In many states, the same jury decides both guilt and sentence. Since some jurors state that their opposition to capital punishment prevents them from ever considering the death penalty, they are excluded from both parts of the proceeding in these states. The process of eliminating these jurors is called "death qualifying" a jury. *Id.* at 162-63.

183. *Id.* at 173-76.

184. *Id.*

185. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (even though statute prohibiting interracial marriage statute visits equal harm on both black and white citizens, it still violates the Equal Protection Clause).

3. *SJS Creates Empirically Valid Race Based Peremptory Challenges*

Proponents of SJS could argue that unlike the invidious stereotypes of prosecutors and trial attorneys, they have an empirical basis for peremptory challenges. Under this argument, SJS could pass strict judicial scrutiny, since its methods guarantee that some correlation will exist between the presence of an attitude and the race of the juror. In *City of Bridgeport*, the trial judge responded to the government attorney's assertion that black jurors would favor the plaintiff by asking the attorney if he had any "empirical data" to support his position.[186] In his opinion in the case, the trial judge seemed to condemn the attorney for his use of "instinct," but gives no clear indication whether empirical data could have saved the attorney's peremptory challenges.[187]

Under the strict scrutiny of the Equal Protection Clause, no amount of empirical data can justify a race-based classification unless it clearly demonstrates that all of the members of one race share an attitude which all persons of other races do not hold.[188] By nature, the findings of SJS are only statistical generalizations. SJS searches for tendencies and averages, making many errors of classification. No stereotype or generalization based on SJS could survive the strict scrutiny that the courts traditionally apply to race-based classifications. Consider for example, *Craig v. Boren*,[189] in which the Court struck down an Oklahoma statute permitting women under the age of twenty-one to purchase beer but not men.[190] In support of the statute, Oklahoma presented evidence that males between the ages of eighteen and twenty-one

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186. Clark v. City of Bridgeport, 645 F. Supp. 890, 893-94 (D. Conn 1986).

187. *Id.* at 894.

188. The heightened scrutiny which the Court demands of race-based classifications requires that the classification fit its statutory goal more closely than any of its possible alternatives. *See, e.g.*, McLaughlin et al. v. Florida, 379 U.S. 184, 196 (1964) (racial classifications bear "a heavy burden of justification [and] will be upheld only if [necessary] and not merely rationally related to the accomplishment of a permissible state policy.") For a discussion of the "goodness of fit" issue in heightened scrutiny, see JOHN HART ELY, DEMOCRACY AND DISTRUST 146-49 (1980).

189. 429 U.S. 190 (1976).

190. *Id.* at 210.

were ten times more likely to be arrested for drunk driving than females of the same age.[191] If such statistical disparity could not satisfy the heightened scrutiny of gender based claims, then they could not satisfy the strict scrutiny of racial classifications. As applied to SJS, the statistics in *Craig* represent a much better fit between the classification and the state interest than do most of the SJS data from demographic correlation of the attitudes used in jury selection.[192]

Furthermore, the demographic surveys are extremely unlikely to have much persuasive effect on a court, especially the Supreme Court. Considering the treatment that social science methodologies have received in past cases involving intelligence tests,[193] jury simulations,[194] and jury representativeness,[195] an SJS consultant can scarcely hope to convince a court that it should permit a race-based classification as a result of survey data.

4. *In SJS, Race is Only One Component of a Demographic Survey*

SJS could defend its methods by joining the ranks of the prosecutors who have successfully weathered *Batson* challenges by admitting that they considered race, but pointing to a number of characteristics other than race to support their challenges.[196] This potential loophole in the *Batson* prohibition arises from ambiguity

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191. *Id.* at 200-201. Less than .2% of females between 18 and 21 were arrested versus 2% of males. *Id.*

192. In *Craig*, more than ninety percent of those arrested for drunk driving in Oklahoma were male. By contrast, one of the most extensive mock trial studies conducted at Harvard by Reid Hastie and his colleagues correctly predicted less than fifty percent of the verdicts using all of their demographic predictors. REID HASTIE ET AL., INSIDE THE JURY 129 (1983).

193. *See* P.A.S.E. v. Hannon, 506 F. Supp. 831 (N.D. Ill. 1980) and criticisms of this case by Donald N. Bersoff, *Testing and the Law*, 36 AM. PSYCHOL. 1047 (1981).

194. *See* Lockhart v. McCree, 476 U.S. 162, 168-73 (1986) (providing Rehnquist's discussion of the death qualification studies). *But see* Phoebe C. Ellsworth, *To Tell What We Know Or Wait For Godot?*, 15 L. & HUM. BEHAV. 77 (1991) (criticizing Rehnquist's analysis).

195. *See* Ballew v. Georgia, 435 U.S. 223, 246 (1978) (Powell, J., concurring) (Justice Powell refers to social science methods and statistics as "numerology"). *See also* Donald N. Bersoff, *Psychologists and the Judicial System: Broader Perspectives*, 10 L. & HUM. BEHAV. 151, 166 (1986) (discussing jury representativeness issues).

196. *See, e.g.*, Alschuler, *supra* note 35, at 173-76.

in the Court's prior decisions. In *Batson*, the Court demanded a race-neutral explanation for the prosecutor's peremptory challenge, but it did not clarify whether a "mixed motive" is acceptable.[197] The question left open is whether *Batson* prohibits peremptory challenges based solely on the race of the venire person or whether it prohibits race from entering into the decision to challenge a juror at all. If *Batson* only prohibits challenges based entirely on race, then most SJS challenges should survive scrutiny under *Batson*.[198] SJS is invariably a multidimensional process in which researchers assess several characteristics of the venire person to assess their desirability as a juror. The recommendations of SJS consultants almost never turn exclusively on a single characteristic.

Courts have had some difficulty untangling the permissible from impermissible motivations of the litigants.[199] Some courts have held that if race made the difference between striking a venire person and not striking, then *Batson*'s probation has been violated. For example, in *Garrett v. Morris*,[200] a prosecutor claimed to have struck black venire persons because they "lacked education." The Appeals Court rejected this explanation since the prosecutor had neglected to strike two white venire persons who had only high school educations, while two of the black venire persons struck had college credit.[201] Other courts have adopted a more lenient standard for *Batson*. In *United States v. Terrazas-Carrasco*,[202] a court upheld the prosecutor's peremptory challenges, even though they may have resulted from both permissible and impermissible motives.[203] This court determined that under *Batson*, a peremptory challenge violates equal protection when exercised "solely on account" of race.[204]

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197. Batson v. Kentucky, 476 U.S. 79, 97 (1986).

198. *See supra* notes 14-32 and accompanying text (discussing SJS procedures).

199. *See, e.g.*, United States v. Alcantar, 897 F.2d 436, 438 (9th Cir. 1990) (remanding to the district court, demanding a fairly elaborate hearing as to whether a race neutral explanation offered by a prosecutor was prejudicial).

200. 815 F.2d 509, 510 (8th Cir. 1987).

201. *Id.* at 514.

202. 861 F.2d 93 (5th Cir. 1988).

203. *Id.* at 94-95.

204. *Id.* at 94.

Under the similar characteristics test, an SJS demographic study that includes race could not survive a *Batson* challenge. If an SJS consultant found that members of a certain race were more likely to hold a certain attitude, and factored this into a formula weighting the desirability of that juror, then an attorney would treat two venire persons who share all of the researched characteristics except race differently. Depending upon the size of the correlation between the race and the attitude relative to others, permissible correlations, the venire person's race might not mean the difference between using a peremptory and not using one. Race will still partly determine the desirability of the juror. The presence of a race variable in SJS makes the process suspect.

The clearest case available on mixed motives suggests that courts will tolerate a racial motivation if other considerations outweighed it. In *United States v. Thompson*,[205] the prosecutor justified a strike by explaining that the venire person "lived in the [defendant's] neighborhood, he's black too, and I thought he would identify with him too much."[206] The court identified the prosecutor as providing exactly the kind of explanation forbidden by *Batson*, but found that the prosecutor had also given a permissible explanation regarding jurors living in the same neighborhood as the defendant.[207] Unable to determine whether the challenge would have been made had the neighbor been white, the court remanded for a determination as to whether the impermissible explanation had mitigated the challenge.[208] As applied to SJS, if the inclusion makes the difference between using a challenge and not using a challenge, it violates the equal protection rights of venire persons. Thus, the inclusion of a forbidden classification in an SJS survey might not cause difficulties for attorney's peremptory challenges if the race variable never alters the challenges. With this "makes a difference" corollary of the similar characteristics test, an SJS consultant still

205. 827 F.2d 1254 (9th Cir. 1987).
206. *Id.* at 1260.
207. *Id.*
208. *Id.* at 1260-61.

ought to avoid collecting or analyzing data using a forbidden classification because it is precisely those circumstances in which the race or gender of the venire person matters that it would become unconstitutional to use them. In the best case, the forbidden classification fails to make a strong or useful prediction. In light of the Court's holdings, however, an SJS consultant can only waste time and money analyzing forbidden classifications.

From Justice Kennedy's reasoning in *Edmonson*, it can be deduced that the use of forbidden classifications in an SJS demographic survey would taint the entire peremptory process for the SJS consultant's client. In determining that the use of peremptory challenges constitutes state action, Justice Kennedy relied on the similarity between jury selection procedures and state employment processes.[209] Kennedy cited cases which hold that when a private party makes employment decisions for the state, equal protection constraints bind that party's decisions.[210] Applying this analogy to SJS, an SJS consultant effectively uses race as an item on a state employment test by including a racial characteristic in a demographic profile. Such a practice would certainly lead to Court action to prohibit reliance on the test, regardless of whether it made a difference to the employment decision for a plaintiff.[211]

To sum up, although SJS differs from conventional jury selection to the extent that a court would have to analyze the *Batson* challenge differently, these differences do not free SJS from the scope of equal protection. An SJS consultant using forbidden classifications risks violating the Court's command that litigants exercise peremptory challenges without regard to the race of the potential jurors.

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209. Edmonson v. Leesville Concrete, Co., 111 S. Ct. 2077, 2085-87 (1991).

210. *Id.* at 2085.

211. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 272, 274 (1986) (plurality opinion) (state may not give preferential treatment in layoffs on basis of race without a compelling state interest); Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc., 372 U.S. 714, 721 (1963) ("any state . . . law requiring applicants to be turned away because of their color would be invalid under the . . . Equal Protection Clause of the Fourteenth Amendment").

V. UNRESOLVED ISSUES

The extent to which the *Batson* cases threaten the enterprise of SJS depends, in part, upon how many classifications are forbidden. As originally stated, *Batson* banned the deliberate exercise of challenges against members of cognizable classes.[212] In restating the *Batson* holding in *Edmonson* and *Powers*, the current Court has prohibited the exercise of a peremptory challenge against anyone on the basis of their race.[213] *Batson* and its progeny now protects white venire persons as well as minorities from being excluded from service on the basis of their race.[214] To date, the Supreme Court has condemned only racial classifications in peremptory challenges, but lower federal courts and some state courts have forbidden classifications based on gender, ethnicity, and religion as well.[215] Since *Batson* and its progeny rely on the Equal Protection Clause of the Fourteenth Amendment, the holdings are probably limited to classifications that require heightened scrutiny, such as race or gender. This leaves attorneys and SJS consultants free to use variables such as age, education, and marital status in determining which venire persons to strike. However, the Fourteenth Amendment is not the only constitutional provision which requires courts to take a careful look at the justification for treating individuals differently.[216] For example, the First Amendment's protection of freedom of association could logically prevent a litigant from striking venire persons because of their membership in a political organization. Thus far, equal protection

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212. Batson v. Kentucky, 476 U.S. 79, 97 (1986).

213. *See supra* notes 98-136 and accompanying text (analyzing *Batson* in light of *Edmonson* and *Powers*).

214. *See id.* (discussing the impact of *Batson* and its progeny on standing issues).

215. *See, e.g.*, United States v. Greer, 939 F.2d 1076, 1086 (5th Cir. 1991) (may not strike venire persons because of "race, religion or national origin"); United States v. DeGross, 913 F.2d 1417, 1426 (9th Cir. 1990) (prosecutor may not strike venire persons because of their gender); Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass. 1979) (Massachusetts Constitution forbids use of peremptories against venire persons because of their membership in groups defined by "sex, race, color, creed and national origin").

216. *See infra* notes 321-341 and accompanying text.

is the only basis for attacking peremptory challenges, but *Batson* provides the foundation for further assaults.

Batson and its recent progeny have added a new source of contention in the litigation process. The extent of satellite litigation created by these cases is as yet unknown, but it may be extensive.[217] While *Batson's* effect in terms of extending or delaying litigation is unknown, it could be substantial.[218] *Edmonson*, *Powers*, and *McCollum* fail to answer some of the issues *Batson* left unresolved since they do not create clear a limit to *Batson*'s scope. Several questions remain unanswered, including the types of litigants who have standing to raise *Batson* claims and which venire persons require Fourteenth Amendment protection from exclusion by peremptory challenge. This section will discuss these open questions and their potential impact on SJS.

A. Synthesis of Powers and Edmonson

Like *Batson*, *Edmonson* was a black litigant asserting third party standing on behalf of black venire persons. One could argue that like *Batson*, *Edmonson* only applies when a member of a cognizable racial minority faces an opponent who strikes members of the same minority. Although *Powers* overruled this limitation on standing to raise *Batson* claims, Powers was a criminal defendant who attacked the peremptory challenges of a prosecutor, not a civil litigant who objected to the challenges exercised by an opponent.[219] Taken together, however, *Powers* and *Batson* suggest no limitation on who may raise a *Batson* objection. Notably

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217. LEXIS and Shepard's searches reveal hundreds of published appeals based on *Batson*. These appeals fall generally into two classifications: Those cases in which the defendant argues that the trial judge erred in deciding that he had not made a prima facie case, and those in which the defendant contends that the prosecutor's race-neutral explanation was invalid. A brief survey of the case law reveals that these issues are far from settled. *See* Alschuler, *supra* note 35, at 170-76; Mintz, *supra* note 35, at 1034-38.

218. *See, e.g.*, Pizzi, *supra* note 35, at 138-44 (arguing that *Batson* adds too much to the cost of conducting a trial); *see also* Justice Scalia's discussion in *Edmonson*, 111 S. Ct. at 2095-96 (1991) (Scalia, J., dissenting).

219. *See supra* notes 72-106 and accompanying text (discussing the *Powers* and *Batson* decisions).

absent from the *Edmonson* majority's list of requirements for making out a prima facie case of discriminatory intent is any reference to the race of the parties.[220] Even though the *Edmonson* court reviewed the case of a black plaintiff raising the constitutional claims of black venire persons, the *Edmonson* majority refused to withhold standing from a litigant of any race.[221] This holding stands as a stark contrast to the *Batson* decision. Taken together with the *Edmonson* majority's heavy reliance on *Powers*, it would seem that anyone may raise the Fourteenth Amendment claims of challenged jurors in civil or criminal cases.

Furthermore, in a related case, *Hernandez v. New York*,[222] Justice Kennedy, writing for the majority, rewrote *Batson*'s standing requirements to comport with *Powers*.[223] In *Hernandez*, a Latino defendant objected to a prosecutor's admitted use of peremptory challenges to exclude jurors fluent in both English and Spanish.[224] As a prerequisite to evaluating the constitutionality of the impact that such use of peremptory challenges would have on the presence of Latino jurors, the Court first had to conclude that Latino venire persons fell within the protections offered by *Batson*.[225] A number of lower courts had already concluded that *Batson* applies to Latinos,[226] and the majority had little problem with such holdings, noting that defendants can raise a *Batson* claim if they can show that the prosecutor has exercised peremptory challenges on the basis of race, as a prima facie matter.[227] Although Kennedy cited *Batson* for this proposition, he did not cite *Batson*'s exact language. While Kennedy demanded that a defendant demonstrate that race played a role in the challenge,

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220. *Edmonson*, 111 S. Ct. at 2088-89.
221. *Id.* at 2087-88.
222. 111 S. Ct. 1859 (1991).
223. *Id.* at 1865-66.
224. *Id.* at 1864-65.
225. *Id.* at 1866.
226. *See, e.g.*, United States v. De La Rosa, 911 F.2d 985, 990-91 (5th Cir. 1990); United States v. Rudas, 905 F.2d 38, 41 (2d Cir. 1990); United States v. Alvarado, 891 F.2d 439, 443 (2d Cir. 1989).
227. *Hernandez*, 111 S. Ct. at 1866.

Batson required that "[t]he defendant must demonstrate that he is a member of a cognizable group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."[228] The majority's novel language rewrote *Batson*, removing the implication that *Batson* only forbade a prosecutor from eliminating racial minorities. The Court views the specter of racial assumptions in peremptory challenges as an evil unto itself, suffered by the community and the affected venire persons.[229] *Batson* addressed only the unfairness of trying a minority by a jury deliberately chosen to exclude members of his race. Where *Batson*'s limitations arise from a mingling of the rights of the defendant and the venire person, Kennedy makes a clean break. In his opinions in *Hernandez*, *Powell*, and *Edmonson*, he defends the rights of the venire persons against exclusion from service on the basis of invidious stereotypes.[230]

B. Beyond Racial Minorities

Many lower courts have heard equal protection objections to peremptory challenges based on gender,[231] ethnicity[232] and attitudes.[233] The courts are currently divided on these issues and the Supreme Court has left them unanswered. Courts have also used expansions of *Batson* to cover challenges to white venire persons.[234] As discussed in this section, these issues remain clouded, since the Supreme Court has yet to address them, and

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228. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

229. *See supra* notes 104-106 and accompanying text.

230. *See supra* notes 98-130, 174-179 and accompanying text (discussing Justice Kennedy's attitudes regarding the use of stereotypes in the peremptory challenge process).

231. United States v. DeGross, 913 F.2d 1417, 1419 (9th Cir. 1990); United States v. Wilson, 867 F.2d 486, 488 (8th Cir. 1989); United States v. Hamilton, 850 F.2d 1038, 1040 (4th Cir. 1988); United States v. Dennis, 804 F.2d 1208, 1210 (11th Cir. 1986).

232. Murchu v. United States, 926 F.2d 50, 52 (1st Cir. 1991); United States v. DiPasquale, 864 F.2d 271, 275-77 (3d Cir. 1988); United States v. Anguilo, 847 F.2d 956, 984-85 (1st Cir. 1988); United States v. Bucci, 839 F.2d 825, 832-33 (1st Cir. 1988).

233. United States v. Salamone, 800 F.2d 1216, 1219-20 (3d Cir. 1986).

234. Roman v. Abrams, 822 F.2d 214, 226-27 (2d Cir. 1987).

lower courts are somewhat divided.[235] While *Batson* applies explicitly to racial minorities, how far *Batson* extends beyond race-based challenges remains uncertain. As applied to SJS, the limits that *Batson* places on SJS depend entirely upon its scope. Before 1991, *Batson* applied only to prosecutors and their challenges against members of cognizable classes, and as a result, had only limited application to SJS. If *Batson* and its extensions forbid all use of race in peremptory challenges by any litigant, then SJS must adjust to avoid the use of race. If *Batson* extends to gender as well as race, then SJS is further disrupted. The more categories which are forbidden, the more difficult it will be for SJS to stay within constitutional boundaries.

1. Challenges to White Venire Persons Based on Race

In at least one case, a lower court has overturned the conviction of a defendant because a prosecutor used peremptory challenges in a deliberate attempt to eliminate white venire persons. In *Roman v. Abrams*,[236] the Second Circuit reviewed the case of a white defendant's conviction by a jury which resulted from a prosecutor's attempts to exclude white venire persons.[237] In overturning the conviction, the Second Circuit condemned the "wholesale exclusion" of white jurors practiced by the prosecution.[238] The court observed that although such exclusion normally occurs only against traditionally disadvantaged groups, excluding traditionally majority groups is also objectionable because such an exclusion arbitrarily "deprives that group of a share of the responsibility for the administration of justice, deprives the defendant of the possibility that his petit jury will reflect a fair cross section of the community and gives every appearance of unfairness."[239] The Supreme Court's expanded standing to raise a *Batson* claim encompasses peremptory challenges based on any race, minority or

235. *See infra* notes 236-300 and accompanying text.
236. 822 F.2d 214 (2d Cir. 1987).
237. *Id.* at 221.
238. *Id.* at 228.
239. *Id.*

otherwise. As discussed previously, *Hernandez* and *Powers* rewrite *Batson* to cover challenges based on race rather than on membership in a cognizable class. Thus, *Batson* has become more than a protection for minority defendants.

The Court now demands that litigants exercise peremptory challenges in a race-neutral fashion, regardless of previous histories of discrimination of racial groups.[240] This requirement comports with the current Court's ambivalence towards affirmative action programs.[241] The Court now applies its highest level of equal protection scrutiny to racial classifications, without exception for remedial statutes and practices which favor minorities.[242] In a recent case, *City of Richmond v. J. A. Crosen Co.*,[243] a majority of the Court struck down an affirmative action plan devised by the City of Richmond, Virginia.[244] In doing so, the Court declared that the Fourteenth Amendment permits governmental entities to engage in affirmative action only after a specific finding that a history of racial disadvantage and discrimination exists.[245] Furthermore, the state must narrowly tailor the remedial action to redress that specific history.[246]

Under these standards, peremptory challenges against white venire persons cannot fit into the narrow exception the Court has carved out for remedial action. Peremptory challenges against white venire persons on the basis of their race do not redress a history of discrimination against minorities: Litigants challenge venire persons on the basis of race because they believe that it will give them an advantage. Thus, both the language and the theory driving the Court's recent equal protection analysis in both peremptory challenges and other issues dictate that courts entertain objections to peremptory challenges based on any racial stereotype. Given the

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240. *See supra* notes 98-136 and accompanying text (discussing the present status of race-based peremptory challenge law).

241. *See, e.g.*, Joint Statement, *Constitutional Scholar's Statement on Affirmative Action After City of Richmond v. J.A. Crosen Co.*, 98 YALE L.J. 1711 (1989).

242. *Id.* at 1712-13.

243. 488 U.S. 469 (1989).

244. *Id.* at 511.

245. *Id.* at 498-506.

246. *Id.*

Crosen holding, it should come as no surprise that the Court has altered *Batson*'s language. If the Equal Protection Clause protects both minority and non-minority groups alike, then neither black nor white venire persons may suffer exclusion from jury service as a consequence of their race.

2. *Challenges Based on Ethnicity*

The Court has not heard any cases concerning challenges based on the ethnic background of the venire person. In other contexts, however, Justice Rehnquist has observed that in the United States, ethnicity is the "close cousin" of race and should be considered for Fourteenth Amendment's heightened scrutiny.[247] Like race, ethnicity is an immutable characteristic that invites stereotyping and invidious generalizations.[248] For decades, famous litigators have advised attorneys as to those ethnic groups which might favor types of cases.[249] Social scientists have followed suit, using ethnic characteristics as part of their SJS work.[250] If *Batson* applies to ethnicity in the same manner as race, then the use of ethnicity by SJS is equally forbidden.

Although peremptory challenges based on ethnicity are rarely challenged and rarely succeed, at least two circuits have accepted the application of *Batson* to ethnic groups. In *United States v. Biaggi*,[251] the Second Circuit agreed that the defendant had made

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247. Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). In fact, some of the earliest cases applying heightened scrutiny to statutes involving racial classifications actually concern national origin more so than race. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (scrutiny of a statute discriminating against Chinese-Americans); Korematsu v. United States, 323 U.S. 214 (1944) (scrutiny of internment of Japanese-Americans during World War II).

248. For a discussion of the relevance of immutable characteristics to equal protection analysis, see JOHN H. ELY, DEMOCRACY & DISTRUST 150-60 (1980).

249. *See, e.g.*, Clarence Darrow, *Attorney for the Defense*, ESQUIRE, May 1936, at 36-37, 211-213 (Darrow warns against having persons of Scotch and Scandinavian descent on a jury, because they allegedly tend to adopt a cold, punitive stance); F. LEE BAILEY & HENRY B. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS, 84-85 (1971) (instructing the reader to use jurors of Southern European descent because of their emotional zeal).

250. *See, e.g.*, Zeisel & Diamond, *supra* note 23, at 166-67 (describing one characteristic of the ideal juror in the Mitchell-Stans Watergate conspiracy trial as someone who does not have Jewish ancestry).

251. 909 F.2d 662 (2d Cir. 1990).

out a prima facie claim of racial discrimination against a prosecutor who had eliminated jurors of Italian descent.[252] The court, however, dismissed the defendant's claims by accepting the prosecution's ethnic neutral explanation.[253] Other courts have been more reluctant to apply *Batson* to ethnic groups. Courts in the First Circuit have held that although in principle, *Batson* forbids strikes on the basis of ethnicity, groups such as Irish-Americans are not protected since they are not a cognizable class.[254] Similarly, other courts have held that Italian-Americans are not a cognizable class for the purposes of jury service.[255] All three cases rely on the language in *Batson* that proscribes equal protection attacks on peremptory challenges to members of cognizable classes.[256] All of these courts agreed that these two groups did not fit the definition of cognizable class. In particular, these groups are not set apart by others and treated differently under the law as practiced or applied.[257]

As discussed, the Court has eliminated the limitation that supports these decisions.[258] Standing to raise a *Batson* claim no longer depends upon membership in a cognizable group.[259] Standing may rely instead on the Court's analysis of the harm to the community and to the group which results from their arbitrary elimination from jury service.[260] Some of the ethnicity cases encompass identical elements of the race cases. For example, *Murchu v. United States*[261] involved the prosecution of an individual accused of smuggling arms to the Irish Republican

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252. *Id.* at 678-79.

253. *Id.* at 679.

254. United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987); *see also* Murchu v. United States, 926 F.2d 50, 55 (1st Cir. 1991).

255. United States v. Angiulo, 847 F.2d 956, 984-85 (1st Cir. 1988); United States v. Bucci, 839 F.2d 825, 832-33 (1st Cir. 1988); United States v. DiPasquale, 864 F.2d 271, 275-77 (3d Cir. 1988).

256. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

257. *Bucci*, 839 F.2d at 833. The ethnicity cases also present problems of identification. In both *Bucci* and *Sgro*, the prosecutor had eliminated jurors whose surnames matched ethnic classifications without actually bothering to question the prospective jurors as to their ethnic background.

258. *See supra* notes 98-136 and accompanying text (discussing limitations on standing).

259. Powers v. Ohio, 111 S. Ct. 1364, 1368 (1991).

260. As discussed in *Powers*, 111 S. Ct. at 1368.

261. 926 F.2d 50 (1st Cir. 1991).

Army. The defendant accused the prosecution of eliminating all of the jurors with Irish surnames.[262] Like the case of a state's attorney eliminating black jurors in a civil rights case, this strategy creates the appearance of unfairness. It denies service to those individuals who represent a constituency with a clear interest in the outcome of the case. Similarly, in *United States v. DiPasquale* and *United States v. Bucci*, the defendants were charged with mafia related crimes.[263] Under a scheme which demands a showing that such exclusion harms the excluded individual and society, DiPasquale, Bucci and Murchu have compelling claims. These defendants clearly wanted members of their own ethnic group on the jury for reasons which resemble the claims of black and Latino defendants. In both types of cases, the exclusion harms the appearance of justice and the group loses their ability to represent themselves in a small, but important component of the criminal justice process. In these cases, a litigant's stereotype deprives the excluded jurors of their opportunity to serve. Although Irish-Americans and Italian-Americans may lack a history of systematic exclusion from jury service that would make them "cognizable groups," the Court has lifted this limitation. Because the Court no longer limits *Batson* to groups with a history of discrimination, challenges based on ethnicity must also violate the Fourteenth Amendment.

3. Challenges Based on Gender

The Court has yet to address the application of *Batson* to classifications other than race. In his dissent in *Edmonson*, Justice Scalia criticizes the majority for burdening the courts by forcing them to "[a]ssure that race is not included among the other factors (sex, age, religion, political views, economic status) used by private

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262. Three jurors with such surnames were eliminated for cause; the defense objected to the prosecution's elimination of jurors named "Reardon," "Curran," "Connolly," and "Kirk." *Id.* at 53.

263. United States v. DiPasquale, 864 F.2d 271, 274 (3d. Cir. 1988) (charging defendants with extortion); United States v. Bucci, 839 F.2d 825, 826-27 (1st Cir. 1988) (charging defendants with drug trafficking).

parties in exercising their peremptory challenges."[264] The statement assumes that the Fourteenth Amendment permits the use of gender and other characteristics as a basis for peremptory challenges. At least with regards to the sex of venire persons, some lower courts disagree.

Although jury representativeness issues arise most frequently from disparities among racial groups, other classifications can also result in constitutional challenges. The Court has struck down venire systems which underinclude blacks,[265] Latinos,[266] women,[267] and even blue collar employees.[268] The impressive pedigree of case law dealing with representative venire panels does not translate directly into a requirement that peremptory challenges preserve the representativeness of the venire. *Swain v. Alabama*[269] precludes this interpretation of the venire cases. *Swain* effectively eliminated Sixth Amendment attacks on peremptory challenges.[270] Therefore, any objection to the exercise of peremptory challenges against a class of persons must rest on the equal protection jurisprudence associated with that classification.

To demand a gender-neutral explanation for peremptory challenges, a litigant would have to assert the equal protection claims of the jurors excluded on the basis of gender. Lower courts have split on whether the Fourteenth Amendment protects venire persons from peremptory challenges based on gender. A number of courts accept gender-based explanations as satisfying the prosecutor's burden of presenting a race-neutral motivation for a peremptory challenge without even discussing the issue. For example, in *United States v. Wilson*,[271] the prosecutor explained that he had used two of his challenges against black females in an effort to increase the number of males on the jury.[272] The Eighth

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264. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2096 (1991) (Scalia, J., dissenting).
265. *See, e.g.*, Carter v. Jury Comm'n of Green County, 396 U.S. 320 (1970).
266. Castaneda v. Partida, 430 U.S. 482, 495 (1977).
267. Taylor v. Louisiana, 419 U.S. 522, 537 (1975).
268. Thiel v. Southern Pac. Co., 328 U.S. 217 (1946).
269. 380 U.S. 202 (1965).
270. *Id.* at 206.
271. 867 F.2d 486 (8th Cir. 1989).
272. *Id.* at 488.

Circuit accepted this as the kind of clear, specific, race-neutral reason which satisfies *Batson* without any discussion of the constitutionality of deliberately excluding women.[273] Three subsequent cases in the Eighth Circuit followed this precedent.[274] These courts neither discuss nor review the constitutionality of gender based peremptory challenges.

At least one court has ruled explicitly that *Batson* does not apply to gender-based challenges. In *United States v. Hamilton*,[275] the court declared that gender-based peremptory challenges do not offend the equal protection rights of female venire persons.[276] In *Hamilton*, the prosecutor struck three black, female jurors.[277] When the court demanded an explanation, he asserted that female jurors would sympathize with the female defendants in the case.[278] The court declared that even though females could not be deliberately excluded from jury venires, the issues presented by peremptory challenges differ.[279] To support its position, the court relied on the specific language in *Batson* which refers to the race of the defendant and venire persons. Thus, the *Hamilton* court concluded that although heightened scrutiny does apply to gender-based discrimination, the language in *Batson* limits its application to racial issues.[280]

The Ninth Circuit has taken a view contrary to the Fourth. In *United States v. DeGross*,[281] a male defendant protested a prosecutor's pattern of striking only male venire persons. The district court judge refused to require that the prosecutor provide

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273. *Id.*

274. United States v. Hoelscher, 914 F.2d 1527, 1540-41 (8th Cir. 1990); United States v. Nicholson, 885 F.2d 481, 482-83 (8th Cir 1989); United States v. Ross, 872 F.2d 249, 249-50 (8th Cir. 1989).

275. 850 F.2d 1038 (4th Cir. 1988).

276. *Id.* at 1042-43.

277. *Id.* at 1041.

278. *Id.*

279. *Id.* at 1042-43.

280. *See also* United States v. Dennis, 804 F.2d 1208, 1210 (11th Cir. 1986) (holding that although the test for "cognizable class" in *Batson* refers to the *Castaneda* case, this means that blacks, and not black males specifically are a cognizable class, and therefore peremptory challenges against black males because they were male do not raise the *Batson* issue).

281. 913 F.2d 1417 (9th Cir. 1990).

a gender-neutral explanation for the challenges.[282] On appeal, the Ninth Circuit reversed. The *DeGross* court began its analysis with the same observation made by the Fourth Circuit--*Batson* explicitly applies only to race-based challenges.[283] It went beyond this observation, however, and held that like race, gender-based practices merit a higher level of scrutiny for Fourteenth Amendment analysis.[284] This heightened scrutiny required the court to review the nature of the governmental interest and the relationship of its practice of striking female venire persons to that interest.[285] The court noted that the peremptory challenges are part of a scheme to create an impartial jury.[286] Gender-based challenges result from assumptions about the different proclivities of male and female jurors. Like racial classifications, these assumptions lack any clear foundation.[287] Furthermore, gender may not serve as a proxy for a hidden prejudice, since voir dire provides a means of uncovering bias.[288] The court thus concluded that gender-based assumptions do not further the state's interest in a neutral jury because they are usually unfounded and always imperfect.[289] The court observed that gender is "simply unrelated to [one's] ability to serve as a juror."[290] The *DeGross* court also expressed concern that jury selection strategies which discriminate against various groups in the community might erode public confidence in the jury system.[291] It declared that a jury is not truly representative unless both sexes have an equal opportunity to serve.[292]

Although *DeGross* relies in part on the harm to the community which results from gender discrimination in the courtroom, the

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282. *Id.* at 1420.
283. *Id.* at 1421.
284. *Id.* at 1422.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* at 1423.

decision turns on the heightened scrutiny applied to gender-based classifications. The opinion reviews the relationship between the state's interest in an impartial jury and the practice of eliminating jurors on the basis of their gender.[293] The court concluded that, in general, peremptory challenges further the state's interest in creating an impartial jury.[294] Ordinarily, a litigant may act on assumptions concerning the prejudices of venire persons, and the litigant can defend such a practice as having a rational relationship to its interest in an impartial jury. When the assumption arises from a classification which demands scrutiny higher than rational basis, however, the peremptory challenge that results cannot survive constitutional review. The heightened scrutiny robs the challenge of its purpose.

Despite the widespread acceptance of gender-based peremptory challenges, and the apparent split between the circuits, *DeGross* is a well reasoned opinion. The Fourteenth Amendment challenges to gender discrimination have a mixed history,[295] but the Supreme Court has applied heightened scrutiny to gender discrimination in jury selection. In a pair of cases, the Court struck down jury selection statutes which treated males and females differently.[296] In each case, the Court relied on the Sixth Amendment rights of a criminal defendant, but used language which indicates that gender discrimination in jury selection must pass heightened scrutiny.[297] In *Taylor v. Louisiana*, the State defended its denial of jury service to women on the grounds that so many women would be excused to tend to their children that administrative convenience permitted Louisiana to grant a blanket exemption to all women.[298] Although it acknowledged that the statute might pass rational basis scrutiny,

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293. *Id.* at 1422.

294. *Id.* at 1423.

295. *See, e.g.*, Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 918-43 (1983).

296. Duren v. Missouri, 439 U.S. 357, 360 (1979); Taylor v. Louisiana, 419 U.S. 522, 525 (1976).

297. *Taylor*, 419 U.S. at 525; *Duren*, 439 U.S. at 368-70.

298. *Taylor*, 419 U.S. at 534-35.

the Court struck down the statute as unconstitutional.[299] Since even Chief Justice William Rehnquist has asserted that gender-based classifications require a "sharper focus" than rational basis scrutiny,[300] gender-based peremptory challenges must raise Fourteenth Amendment difficulties. This "sharper focus," or intermediate scrutiny, requires that litigants refrain from using overbroad generalizations based on gender when exercising peremptory challenges.

C. Heightened Scrutiny and the Batson *Challenge*

Peremptory challenges based on race, ethnicity and gender may violate the Fourteenth Amendment because of the heightened judicial scrutiny required by these classifications. The Fourteenth Amendment declares that no state may deny persons "[t]he equal protection of the laws."[301] This clause requires the courts to review any state's legislation to ensure that statutes advance a legitimate state interest.[302] A statute will satisfy the Equal Protection Clause if it is "[r]ationally related to a legitimate state interest."[303] Courts must deny an equal protection claim if the statute in question bears so much as a "theoretical connection" with the state interest.[304] When the statute or practice in question involves a suspect classification, however, the Fourteenth Amendment requires a closer relationship between the statute and the state interest.[305]

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299. *Id.* at 533-35. Note that in an earlier case, Hoyt v. Florida, 368 U.S. 57 (1961), the Court had ruled that a Florida statute, similar to that in *Taylor*, passed an equal protection challenge because it satisfied rational basis scrutiny. This case, however, predated the earliest application of heightened scrutiny for gender discrimination in Reed v. Reed, 404 U.S. 71 (1971).

300. Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 468 (1981).

301. U.S. CONST. amend. XIV, § 1.

302. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949).

303. New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

304. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 (1981).

305. There are numerous types of suspect classifications. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (mental illness); Sugarman v. Dougall, 413 U.S. 634 (1973) (alienage); Reed v. Reed, 404 U.S. 71 (1971) (gender); Levy v. Louisiana, 391 U.S. 68 (1968), Glona v. American Guar. and Liab. Ins. Co., 391 U.S. 73 (1968) (marital status of parents); Korematsu v. United States, 323 U.S. 214 (1944) (ethnicity). These do not include certain classifications . *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (sexual preference); Massachusetts Bd. of Retirement v.

As applied to peremptory challenges, the Fourteenth Amendment requires that courts assess the purpose of the challenges and the relationship between the purpose and the actual practice of exercising challenges. Peremptory challenges promote an impartial jury trial. By permitting each side to exclude jurors without explanation, a court eliminates jurors with extreme biases. Each side excludes unfavorable venire persons, leaving only neutral jurors. The rationality of this system depends upon at least a theoretical relationship between the challenges and the attitudes of the jurors.[306] If attorneys exercised peremptory challenges at random, without regard to the possibility of bias or prejudice, then the system of peremptory challenges would be an arbitrary exercise of state power against the venire persons. It would then, presumably, violate the equal protection rights of the venire persons. The Court considers the peremptory challenge as a rational means of creating an impartial jury.[307] Under ordinary circumstances then, the peremptory challenge passes scrutiny under the Fourteenth Amendment.

When an attorney uses challenges based on a suspect classification, however, the analysis changes. Such classifications might provide a reasonable, but weak proxy for juror bias. Black jurors might not, for example, always favor black plaintiffs in civil rights claims; they might even make better jurors for the defense. An attorney for the defense, however, may still strike such jurors and defend the practice as rational. Not all black venire persons will favor the plaintiff, but the attorney can defend the belief that

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Murgia, 427 U.S. 307 (1976) (age); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (wealth).

306. In 1975, Zeisel and Diamond conducted an empirical test of rationality of peremptory challenges. Hans Zeisel & Shari S. Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court,* 30 STAN. L. REV. 491 (1978). In this study, Zeisel and Diamond asked those venire persons excluded during voir dire to witness the trial they would have sat on as jurors had they not been challenged. After the trial, Zeisel and Diamond polled the jurors. They discovered that although some of the attorneys eliminated jurors who would have found against them at trial, others had worsened their position by eliminating favorable jurors. *Id.* at 513-18. The effect could have resulted from differential abilities of the attorneys, but Zeisel and Diamond note that it could also occur if attorneys as a group have no ability to spot bias, and merely strike jurors at random. *Id.* at 517-18. Peremptory challenges may, in theory, promote neutral juries, but the above illustrates that they have failed an important empirical test.

307. Swain v. Alabama, 380 U.S. 202, 219-22 (1965).

some might as a rational belief. Thus, the challenge can increase the likelihood of having a neutral jury, and pass a rational basis test. The strike would not, however, satisfy a higher level of scrutiny. For example, the assertion that black jurors will favor black defendants rests on an untested hypothesis which is likely to be false. Furthermore, a juror's race is, at best, a weak predictor of verdict choice.[308] The correlation between race and verdict in any case will be unable to satisfy the requirements of heightened scrutiny under the Equal Protection Clause. In the case of suspect classifications like race, ethnicity and gender, the heightened scrutiny deprives the peremptory challenge of its legislative justification.

But, does an attack on peremptory challenges really require heightened scrutiny? Since jury service constitutes an important element of civic responsibility,[309] perhaps individuals should not be denied access on an arbitrary basis. Secondly, constitutional rights other than the Equal Protection Clause can raise questions about peremptory challenges. In particular, litigants who routinely strike jurors because of their marital status or religious persuasion, invoke their own brands of heightened scrutiny. Finally, the systematic use of peremptory challenges to circumvent other constitutional restrictions on challenges for cause, might raise difficulties.[310] Even beyond the Equal Protection Clause alone, peremptory challenges may raise other constitutional issues that the Court has yet to address.

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308. In one of the most extensive mock trial studies, race of jurors failed to predict verdict choice. HASTIE ET AL., *supra* note 192, at 129-31. These researchers used a "generic" criminal case, and observed that had they used a trial which inspired more polarized community sentiment, they might have found that some of the characteristics they analyzed would have predicted verdict choice. In the abstract, however, race does not predict verdicts. Conversely, in a specific case where racial tensions run high, race might correlate highly with verdict.

309. *See, e.g.*, Powers v. Ohio, 111 S. Ct. 1364, 1368 (1992) ("the opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system") (citing Duncan v. Louisiana, 391 U.S. 145, 147-58 (1968)); *Id.* at 1369 ("with the exception of voting, for most citizens, the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process").

310. *Batson* used specific language on this point. Batson v. Kentucky, 476 U.S. 79, 88 (1986) ("the state may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at later stages in the selection process").

1. Classifications Which do not Raise Heightened Scrutiny

The Court's recent expansion of constitutional claims against peremptory challenges may have created a mechanism for protecting the right to serve on a jury. Twenty years ago, in *Carter v. Jury Commissioner of Greene County*,[311] the Court declared jury service an important aspect of participation in the democratic process, almost equivalent to voting. Furthermore, the Court has repeatedly attacked jury venires which underrepresent various age and economic groups. In an early case, *Thiel v. Southern Pacific Company*,[312] the Court condemned the deliberate exclusion of blue collar workers from jury lists. In *Thiel*, a clerk had excluded blue collar workers from jury lists on the grounds that they would otherwise be summarily excused for reasons of financial hardship.[313] Although the clerk had a rational basis for excluding blue collar workers, the Court rejected the practice as a violation of the jurors' rights to serve.[314] Taken together, *Carter*, *Thiel*, and the discussion of community harm in *Powers*[315] suggest that jury service is a fundamental right which a state may not restrict arbitrarily.

This implies that any form of SJS would be unconstitutional. SJS always depends upon statistical generalizations about groups. Such generalizations have sufficient support to pass rational basis scrutiny, but not the more rigorous scrutiny which would be required if they implicated a fundamental right. Thus, if jury service is a fundamental right, then SJS, and indeed, any peremptory challenge, becomes difficult to justify.

Another line of cases suggests otherwise. A number of courts have faced jury venires drawn from lists which exclude persons

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311. 396 U.S. 320 (1970). The Court explained: "Whether jury service be deemed to be a right, a privilege or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise." *Id.* at 330.

312. 328 U.S. 217, 222-25 (1946).

313. *Id.* at 222.

314. *Id.* at 223-25.

315. Powers v. Ohio, 111 S. Ct. 1364, 1368 (1991).

with last names beginning with certain letters of the alphabet.[316] Despite *Thiel's* declaration concerning the importance of jury service, all three courts ruled that the random exclusion was not of constitutional significance. In one of these cases, *Walker v. Goldsmith*,[317] the Court determined that for the purposes of jury service, a cognizable class is defined as one "[w]hich in some objectively discernible and significant way is distinct from the rest of society, and whose interest cannot be adequately represented by other members of the . . . jury panel." This suggests that equal protection is not an issue in these cases. If such exclusion raises Fourteenth Amendment rights, the cases would turn on whether the groups had been deliberately excluded. As it stands, even *Walker*, the post-*Batson* surname case, restricts its discussion to the nature of the group excluded. The *Walker* court reasons that since the excluded persons do not have distinct interests, their elimination does not raise an equal protection claim.[318] Unlike the blue collar workers in *Thiel*, persons whose last names begin with certain letters do not share interests which cannot be represented by others who ultimately serve on the jury.

Furthermore, *Thiel* and its progeny involve attacks on the composition of the venire, not the jury. Exclusion of a group from the venire results in the wholesale elimination of that group from all juries within the jurisdiction. Exclusion during voir dire prevents an individual from serving in only a single trial. Absent an attempt to subvert voir dire into a mechanism for systematic exclusion,[319] the excluded venire persons have been denied nothing. They may serve on future juries. Individual jurors have the right to serve on

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316. *See* Walker v. Goldsmith, 902 F.2d 16 (9th Cir. 1990) (W-Z excluded); United States v. Puleo, 817 F.2d 702. 706 (11th Cir.), *cert. denied*, 484 U.S. 978 (1987) (M-Z excluded); Krause v. Chartier, 406 F.2d 898, 901 (1st Cir. 1968), *cert. denied*, 395 U.S. 960 (1969) (T-Z excluded). In all three cases, a clerk mistakenly excluded these persons from the selected pool.

317. *Walker*, 902 F.2d at 18 (quoting United States v. Potter, 552 F.2d 901, 904 (9th Cir. 1977)).

318. The court notes that it has researched the possibility that members of society with certain last names suffer from common psychological difficulties which one school psychologist refers to as "alphabetic neurosis." *Id.* at 16 n.1 (citing Joseph W. Autry & Donald G. Barker, *Academic Correlates of Alphabetic Order of Surname*, 8 J. SCH. PSYCHOL. 22, 22 (1970)).

319. *See, e.g.*, State v. Brown, 371 So. 2d 751 (La. 1979); State v. Washington, 375 So. 2d 1162 (La. 1979).

a jury, but not to serve on a particular jury. *Batson*, *Edmonson*, and *Powers* further grant venire persons the right to not face exclusion on the basis of their race.[320]

2. *Jury Service and Other Constitutional Rights*

Creating a minimal right to jury service can create problems beyond the Equal Protection Clause. When demanding race neutral explanations, trial judges have found themselves faced with explanations based on the religious practice, marital status, or political affiliation of the venire persons.[321] Both religious practice and marital status have found favor as fundamental rights guaranteed by the Constitution, at least in nonjury contexts.[322] Since both lines of precedent forbid a state from denying a privilege or right to an individual because of their religious practices or their marital status, a juror ought to be able to assert these claims. Striking jurors based on their political affiliations also raises penumbra free speech rights.

As with the equal protection claims, a complaint by a venire person based on any of these rights is extremely unlikely. At this time, no court has recognized third party standing for litigants to raise the First Amendment claims or penumbra constitutional rights of excluded venire persons. Indeed, dicta in the *Batson* case suggests that the *Batson* claim is restricted to standing for equal

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320. *See supra* notes 98-136 and accompanying text.

321. United States v. Thomas, 914 F.2d 139 (8th Cir. 1990) (venire person struck because he belonged to the same religion as the defendant); United States v. Clemmons, 892 F.2d 1153 (3d Cir. 1989) (venire person struck because he was "Asian-Indian and probably Hindu"); United States v. Clemens, 843 F.2d 741 (3d Cir. 1988) (prosecutor liked to use challenges against young, single venire persons); United States v. Nicholson, 885 F.2d 481 (8th Cir. 1989) (prosecutor expressed preference for older, married, male jurors); United States v. Prine, 909 F.2d 1109 (8th Cir. 1990) (prosecution tried to eliminate all young, unmarried venire persons); United States v. Hughes, 911 F.2d 113 (8th Cir. 1990) (prosecutor challenged individual because he was young, single and shabbily dressed); United States v Jackson, 914 F.2d 1050 (8th Cir. 1990) (venire persons excluded because they were young and single).

322. *See, e.g.*, Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707 (1981) (state may not deny individuals employment benefits as a result of their religious persuasion); Zablocki v. Redhail, 434 U.S. 374 (1978) (state may not deny right to marry); Loving v. Virginia 388 U.S. 1 (1967) (state may not prohibit interracial marriage); Sherbert v. Verner, 374 U.S. 398 (1963).

protection.[323] The Court distinguished third party standing for equal protection from standing to raise Fourth Amendment rights in cases of juror surveillance.[324] Thus, although such a claim is possible, it has yet to find widespread acceptance.

The Fifth Circuit, in *United States v. Greer*,[325] has construed the 1991 trilogy of Supreme Court cases as extending *Batson* to peremptory challenges exercised on the basis of religious practice.[326] Facing a charge for civil rights violations against members of the Jewish community, the defendant requested that the judge inquire into the religious practices of each venire person.[327] The trial judge refused.[328] In denying the defendant's appeal, the Fifth Circuit stated that even if the defendant had learned which jurors were Jewish, he could not have used the information.[329] The court concluded that *Edmonson, Hernandez*, and *Powers* prohibit peremptory challenges on the basis of "race, religion, and national origin."[330] The Fifth Circuit did not discuss the origins of its ban on peremptory challenges based on religion other than a string citation to *Batson* and its recent progeny.

Even without a line of precedent to support it, the *Greer* court's analysis of religious-based peremptory challenges is probably correct.[331] In practice, the Free Exercise Clause of the First Amendment has created heightened scrutiny for statutes which discriminate against members of a religion.[332] In *Sherbert v. Verner*,[333] the Court asserted that a statute which impedes the free exercise of religion must be justified by a "compelling state interest"[334] and that "no showing of a rational relationship to a

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323. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986).
324. *Id.* at 89.
325. 939 F.2d 1076 (5th Cir. 1991).
326. *Id.* at 1084-87.
327. *Id.* at 1084.
328. *Id.*
329. *Id.* at 1085.
330. *Id.* at 1086.
331. Although one older case condemns inquiry into the religious practices of venire persons, it failed to generate a line of precedent. Gideon v. United States, 52 F.2d 427 (8th Cir. 1931).
332. *See, e.g.*, Ely, *supra* note 198, at 100.
333. 374 U.S. 398 (1963).
334. *Id.* at 403.

colorable state interest would suffice."[335] With scrutiny similar to racial classifications, religious based peremptory challenges must violate constitutional rights of the venire persons. As with race, religion may have some relationship with the prejudices of the venire persons, but the relationship is less than perfect. Also, the voir dire process obviates any need to use religion as a proxy for suspected prejudice.[336]

Marital status and political affiliation cases raise similar issues. In *Zablocki v. Redhail*,[337] the Court struck down a Wisconsin statute which required that certain individuals obtain judicial permission before they could re-marry.[338] The majority declared that since the statute interfered with a fundamental right, "[i]t cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[339] Similarly, in a line of First Amendment cases, the Supreme Court has held that individuals may not be punished for mere membership in a group.[340] If a court should determine that the First Amendment requires heightened scrutiny for group membership and exclusion from jury service, then peremptory challenges based on such membership cannot stand. As with the cases involving race and gender, heightened scrutiny of classifications which infringe upon marital status and political affiliation can also deprive peremptory challenges of their legitimate purpose.

Although no precedent exists to support the interaction between *Batson* and the right to marry, the Fifth Circuit, in *Greer*, has ruled that *Batson* permits claims based on the Fourteenth

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335. *Id.* at 406.

336. *But see supra* note 134 (discussing relevant peremptory challenge issues).

337. 434 U.S. 374 (1978).

338. *Id.* at 377.

339. *Id.* at 388. *But see* Califano v. Jobst, 434 U.S. 47 (1977) (applying rational basis review to a scheme which terminated benefits received by a disabled dependent child when that child marries).

340. *See, e.g.*, DeJonge v. Oregon, 299 U.S. 353 (1937) (defendant may not be convicted merely for organizing a meeting of the Communist Party); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) (Alabama may not compel the N.A.A.C.P. to disclose its membership lists).

Amendment.[341] Once the Court gave standing to litigants to defend the rights of venire persons, the door was opened to such claims. The heightened scrutiny demanded by the Free Expression Clause deprives a religious based peremptory challenge of its purpose. With the expanded rights to jury service, peremptory challenges based on marriage or political orientation might face a new future. Such an expansion would make further inroads against SJS.

3. Non-Suspect Classifications Based on Shared Attitudes

Other classifications, which do not require heightened scrutiny from either the Fourteenth Amendment or other constitutional rights, probably do not raise difficulties for peremptory challenges. Litigants frequently make assumptions concerning the biases held by jurors based on other classifications, such as expressed attitudes. Like race-based classifications, attitude distinctions are an indicator, albeit imperfect, of bias. As with racial classifications, if these predictions have no basis in reality, then these distinctions will result in the arbitrary exclusion of certain individuals from jury service. The attitude classifications will not, however, result in a Fourteenth Amendment violation. Since attitude classifications do have at least a theoretical basis, they will be sufficient to pass the Fourteenth Amendment's rational basis test.

In *Lockhart v. McCree*,[342] the Supreme Court made it clear that classifications based on shared attitudes in jury selection do not raise Fourteenth Amendment's heightened scrutiny.[343] In *Lockhart*, the Court upheld a jury selection system which excluded venire persons who stated that they could never sentence a convicted felon to death during the guilt phase of a capital jury trial.[344] These jurors, called "Witherspoon Excludables,"[345] do

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341. 939 F.2d 1076, 1085 (5th Cir. 1991).

342. 476 U.S. 162 (1986).

343. *Id.* at 164.

344. *Id.* at 183-84.

345. So named because of Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court case which initially sanctioned this procedure.

not constitute a cognizable class. The Court held that "groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing their duties as jurors . . . are not 'distinctive groups.'"[346] Thus, it would seem that groups formed by shared attitudes do not raise equal protection difficulties.

In a post-*Lockhart* case, the Third Circuit added a qualification to this holding. In *United States v. Salamone*,[347] the court overturned the conviction of a defendant for violating federal gun control laws.[348] At trial, the judge excluded for cause those venire persons who belong to the National Rifle Association (N.R.A.).[349] The trial judge justified the exclusion by citing the N.R.A.'s opposition to gun control laws and advocacy of civil disobedience in gun control.[350] The trial judge assumed that the N.R.A. members would not follow the law in deciding the case.[351] The Third Circuit condemned this assumption, holding that "juror competence is an individual, rather than a group or class matter."[352] The Court expressed concern that "[t]aken to its logical conclusion, the government position would permit exclusion of N.A.A.C.P. members from cases seeking enforcement of civil rights statutes, Moral Majority activists from pornography cases, Catholics from cases involving abortion clinic protests, member of N.O.W. from sex discrimination cases, and subscribers to Consumer Reports from cases involving products liabilities."[353] The difference between *Salamone* and its parade of horribles, and *Lockhart* is that in *Lockhart*, the trial judge eliminated *Witherspoon* excludables because these venire persons specifically stated that they would ignore judicial instructions, thereby rendering them incompetent to serve as jurors. In *Salamone*, the trial judge inferred

346. *Lockhart*, 476 U.S. at 176-77.
347. 800 F.2d 1216 (3d Cir. 1986).
348. *Id.* at 1217.
349. *Id.* at 1218.
350. *Id.* at 1221.
351. *Id.*
352. *Id.* at 1226 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946)).
353. *Id.* at 1225.

incompetence from group membership. *Thiel* and the right to serve on juries forbids a trial judge from making such an inference.

While a trial court may not issue a challenge for cause, a litigant may exercise a peremptory challenge. In fact, the Third Circuit's N.R.A. members would probably not have served on the ultimate jury even if the trial judge had refused to exclude them. Instead of exclusion by the court, they would have faced exclusion by the prosecutor. Similarly, the members of the N.A.A.C.P., the Moral Majority, N.O.W., and the Catholic Church, along with the subscribers to Consumer Reports probably also have little or no chance of actually serving on juries in the cases described in *Salamone*. As the Third Circuit noted, when a judge makes an inference of bias based on group membership, it skews the selection process.[354] When a litigant makes the assumption, however, it furthers the creation of jury in a fair, neutral selection process. Once again, the relationship between the membership in a group and bias may be quite good, but it is less than perfect. The peremptory challenges based on these assumptions will survive a rational basis test, but not strict scrutiny.

The Supreme Court has not explicitly addressed the level of scrutiny to be applied to groups with shared attitudes in jury selection cases, but the *Lockhart* opinion provides some illumination. Justice Rehnquist, writing for the majority in *Lockhart*, observed that exclusion of attitude groups results from "an attribute that is within the individual's control,"[355] thereby distinguishing it from the exclusion of other groups such as "blacks, women, and Mexican-Americans."[356] Also, Rehnquist noted that the elimination of *Witherspoon* excludables "does not prevent them from serving as jurors on other criminal cases, and thus leads to no substantial deprivation of their basic rights of citizenship."[357] Similarly, a peremptory challenge against an N.R.A. member would not deny their basic right to serve on a jury.

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354. *Id.* at 1229.
355. Lockhart v. McCree, 476 U.S. 162, 176 (1986).
356. *Id.*
357. *Id.* at 176.

The Fourteenth Amendment does not forbid the prosecutor in *Salamone* from assuming that the N.R.A. members are biased. Such a rule would have to arise from some other right because the rights of citizenship justify service on juries in general, but do not guarantee service on a specific jury.

In many respects, the distinction between the elimination of the N.R.A. members for cause and by a peremptory challenge is arbitrary. At least one lower court has heard a case addressing this issue. In *Brown v. Dixon*,[358] the Fourth Circuit overturned a district court judge's efforts to meld *Witherspoon* with *Batson*.[359] As part of the death qualification process in the case, the district court inquired into the attitudes among venire persons towards the death penalty during voir dire proceedings.[360] Following rulings in *Witherspoon v. Illinois* and *Lockhart v. McCree*, the judge excluded jurors for cause who stated that they were so opposed to the death penalty that they would never vote to impose it, but refused to exclude jurors for mere opposition to the death penalty.[361] The prosecutor in *Brown* proceeded to use his peremptory challenges against the nine remaining venire persons who expressed opposition to the death penalty.[362] Citing *Batson*, the judge asserted that the prosecutor could not accomplish with peremptory challenges what *Witherspoon* would not allow him to do with challenges for cause, and the judge ordered renewed proceedings.[363] In overturning this ruling, the Fourth Circuit relied on the significance attached to peremptory challenges by the Supreme Court in *Swain v. Alabama*.[364] Arguing that since the peremptory challenge has an important role in creating an impartial jury, *Brown* held that courts may not delve into the motivations for those peremptory challenges based on the attitudes of the venire

358. 891 F.2d 490 (4th Cir. 1989).
359. *Id.* at 496-97.
360. *Id.* at 492-93.
361. *Id.* at 492.
362. *Id.*
363. *Id.* at 496.
364. *Id.* at 496-97 (quoting Swain v. Alabama, 380 U.S. 202, 221-22 (1963)).

persons.[365] The Fourth Circuit declared that to rule otherwise would end the peremptory challenge.[366] The prosecution, or any litigant, may exercise peremptory challenges when the Constitution prevents a judge from doing so simply because the prosecution may make assumptions that a trial judge may not. The trial judge's assumptions can only skew a case, and fulfill no state purpose. The litigant's assumptions, whether arising from SJS or intuition, however, further selection of a neutral jury. Unless the Equal Protection Clause forbids the assumption, the litigant's peremptory challenge furthers the state interest in creating a neutral jury.

To sum up the state of peremptory challenges after the 1990 term, the Supreme Court has forbidden the use of peremptory challenges against groups when they require heightened scrutiny under the Fourteenth Amendment. This includes peremptory challenges based on race, national origin and gender. Through the First Amendment, this prohibition might also include religious practice and membership in a group that raises freedom of association claims. The analysis of peremptory challenges against members of groups which implicate penumbra constitutional rights such as marital status and political affiliation depends upon the continued treatment given to such rights in the Supreme Court. This system leaves a wide variety of peremptory challenges intact, including those based on shared attitudes, age or occupation. A court may not draw up jury lists which impinge upon the right to serve among certain occupations or attitude groups. It must, however, tolerate peremptory challenges against these groups, since they further the neutral selection process.

VI. THE FUTURE/CONCLUSIONS

As long as the Court avoids taking Justice Marshall's suggestion that it eliminate peremptory challenges altogether,[367] SJS retains a place in modern litigation practice. The courts allow

365. *Id.* at 497.
366. *Id.*
367. Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring).

peremptory challenges against jurors who hold unfavorable attitudes or perspectives. To the extent that SJS consultants use voir dire questions to uncover attitudes they will be less likely to trample on the Equal Protection Clause. As tempting a shortcut that overt characteristics like race and gender might be to an SJS consultant, reliance on those characteristics only jeopardizes their clients.

Despite its conservative leanings, the current Supreme Court seems to be committed to expanding the scope of protection of venire persons from invidious discrimination.[368] Although it arises from benign motives, SJS's traditional emphasis on immutable demographic characteristics mimics the bigotry in jury selection that the Court condemns. Until the 1990 Supreme Court term, this mimicry cast an ethical cloud over SJS, but did not endanger its use. Now, however, SJS consultants must confront their past. No longer is their advice harmless, and possibly useful. One law and psychology scholar, describes SJS as "one way to cut chances to a minimum."[369] Even if it "cuts chances," SJS now creates the risk of judicial sanction and needless appeals. It creates the risk of extending voir dire proceedings and can even create the basis for an appeal. SJS can still assist attorneys, but like most trial strategies, a litigant must weigh its benefits against its possible liabilities.[370]

368. *Edmonson* was a 6-3 decision; *Powers* was 7-2. Only 5 Justices actually supported the *McCollum* holding.

369. Gray, *supra* note 2, at 149 (quoting Bruce Sales).

370. *See, e.g.*, Horowitz, *supra* note 5, at 88.